

**No. SC19-1587  
L.T. No. 08-CF-18029  
DEATH PENALTY CASE**

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**In the Supreme Court of Florida**

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STATE OF FLORIDA,  
*Appellant/Cross-Appellee,*

*v.*

KHADAFY KAREEM MULLENS,  
*Appellee/Cross-Appellant.*

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*ON APPEAL FROM THE CIRCUIT COURT  
OF THE SIXTH JUDICIAL CIRCUIT,  
IN AND FOR PINELLAS COUNTY, FLORIDA*

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**ANSWER AND INITIAL CROSS-APPEAL BRIEF  
OF APPELLEE/CROSS-APPELLANT**

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## **REQUEST FOR ORAL ARGUMENT**

This is a direct appeal from a final order denying in part and granting in part Khadafy Mullens's first motion for postconviction relief under Florida Rule of Criminal Procedure 3.851. The resolution of the issues involved in this appeal will determine whether he spends the rest of his life in prison or is executed by the State. This Court has not hesitated to allow argument in other capital cases in similar procedural postures. A full opportunity to air the issues through oral argument is appropriate in this case because of the seriousness of the claims at issue and the penalty that the State seeks to impose.

## **PRELIMINARY STATEMENT**

Citations to the record of the direct appeal of the trial, judgment, and sentence in this case are in the form “R[volume #]/[page #].” Citations to the postconviction record on appeal are in the form “PCR/[page #].”

The decision under review is the postconviction court’s Final Order Denying in Part and Granting in Part Defendant’s Motion to Vacate Judgment and Sentence; Order Vacating Defendant’s Death Sentence; Order Appointing the Office of the Public Defender; Direction to Clerk filed August 21, 2019, in *State of Florida v. Khadafy Mullens*, No. CRC08-18029CFANO-A, UCN 522008CF018029000APC, which is reproduced in the postconviction record on appeal at PCR/2921–47. Citations to the postconviction court’s decision are in the form “Op. [page #] (PCR/[page #]),” where the first page number refers to the original pagination of the postconviction court’s order and the second page number refers to the pagination in the postconviction record on appeal.

## INTRODUCTION

In 2013, Khadafy Mullens pleaded guilty to killing two men and injuring another in the course of a robbery gone wrong. He waived his right to a sentencing jury, and the case proceeded before Circuit Judge Philip J. Federico, sitting as both factfinder and sentencer. Judge Federico found three aggravators, weighed them against the mitigating evidence, and sentenced Mullens to death. Now, six years later, Judge Federico has granted Mullens's motion for postconviction relief in part, vacated Mullens's death sentence, and ordered him to be resentenced.

What caused this reversal? A six-day evidentiary hearing at which Judge Federico heard new and highly persuasive mitigating evidence from over a dozen witnesses, including three new experts. On postconviction review, Judge Federico heard, for the first time, that Mullens's mother drank Bacardi and Olde English nearly every day while she was pregnant, causing Mullens to suffer from fetal alcohol spectrum disorder. He heard, for the first time, expert testimony that Mullens satisfies all three requirements for a finding of intellectual disability under Florida law. He heard, for the first time, expert testimony that Mullens has organic brain damage to the areas of the brain that control judgment, rational thinking, and impulse control. He heard, for the first time, expert testimony corroborating the childhood sexual abuse and rape that Mullens suffered at the hands of his stepfather. He heard, for the first time, expert testimony that Mullens suffers from post-traumatic stress

disorder (PTSD). And he heard, for the first time, how this mitigating evidence affected Mullens's mental state at the time of the crime. It was not until postconviction review that Judge Federico first heard that the crime took place the day before Mullens was to attend his childhood abuser's funeral.

Why was all of this mitigating evidence presented for the first time on postconviction review? As trial counsel testified—no fewer than four times—the only explanation is that counsel “did a bad job.” PCR/1654; PCR/1687; PCR/1698. Counsel had all of the facts in front of them. They knew Mullens's mother drank while pregnant with him; that he suffered serial head trauma in childhood; that his stepfather raped him repeatedly him from the age of six; and that he had flashbacks, nightmares, hypervigilance, and an abnormally high startle response consistent with PTSD. Yet they failed to investigate fetal alcohol spectrum disorder, failed to present evidence of intellectual disability, failed to corroborate his family's suspicions that he was molested, and failed to investigate whether he suffers from PTSD. And they failed to craft any explanation of how Mullens's mental health problems and trauma affected his mental state at the time of the crime.

Counsel's many shortcomings were compounded by their failure to supervise the defense's one expert witness, psychologist Scot Machlus, Ph.D., who was hired at the last minute despite his complete lack of experience with capital defendants. Hiring Dr. Machlus was worse than hiring no expert at all. He failed to identify

Mullens’s organic brain damage, failed to administer psychological tests according to professional standards, made errors in scoring tests, repeatedly relied on psychological diagnoses without first ruling out medical causes (such as brain damage), repeatedly administered prejudicial personality tests, failed to diagnose fetal alcohol spectrum disorder, and failed to diagnose PTSD due to repeated childhood physical and sexual abuse. Counsel made things even worse by failing to correct obvious errors in Dr. Machlus’s work, such as his incorrect conclusion that Mullens had no history of head injury, his failure to recognize the signs of PTSD, and his improper administration of an intelligence test, which resulted in an obviously inflated score.

There can be no question that counsel’s numerous failures prejudiced Mullens. Judge Federico—the judge who sentenced Mullens to death—determined that, had he been presented with all of the mitigating evidence at sentencing, he “would have concluded that the balance of aggravating and mitigating circumstances *did not warrant death*.” Op. 9 (PCR/2929) (emphasis added). Neither this Court nor the public can have any confidence in a death sentence that the sentencing judge has repudiated as both wrong on the merits and based on unconstitutional error. And even setting aside this direct evidence of prejudice, the evidence is overwhelming that Mullens’s sentencing proceedings would have been different had counsel performed adequately. As Judge Federico held, the new mitigating evidence

introduced on postconviction review fundamentally changed the balance between mitigation and aggravation. The postconviction court therefore correctly determined that trial counsel was unconstitutionally ineffective and that Mullens's death sentence must be vacated.

Judge Federico was right to grant Mullens's claim of ineffective assistance of counsel, and this Court should affirm that portion of the decision below. But there are further reasons why Mullens's sentence must be vacated. First, Mullens is intellectually disabled and thus ineligible for the death penalty. The postconviction court held that Mullens presented a "persuasive case of intellectual disability," and noted that the State had put on *no* rebuttal evidence. Op. 25 (PCR/2945). Yet the court denied Mullens's claim, directing him to make a new motion at resentencing. That was error. The court should have determined that Mullens is intellectually disabled based on the postconviction record and vacated his death sentence on that basis. Second, Mullens's guilty plea and his waiver of the constitutional right to a sentencing jury were not competent, intelligent, and voluntary. When Mullens pleaded guilty and waived his jury rights, he was reeling from the recent, sudden death of his sister and on high doses of antipsychotic medication that, according to extensive, un rebutted expert testimony, rendered Mullens unable to form coherent thoughts or make rational decisions. The postconviction court independently should have vacated Mullens's conviction and sentence on this basis.

Trial counsel failed Mullens at every stage of his criminal case—from their incomplete investigation into his obvious disabilities, to their incompetent presentation of what little mitigating evidence they did uncover. Competent trial counsel would have done far more to prevent Mullens from being sentenced to death, and those efforts would have made a difference, as the sentencing judge himself has held. This Court should affirm that judgment, and should further reject the State’s efforts to execute an intellectually disabled man under a death sentence that rests on unwilling, unconstitutional waivers of his constitutional rights.

## **STATEMENT OF THE CASE**

### **I. FACTUAL BACKGROUND**

#### **A. Mullens’s Long History of Serious Mental Problems and Abuse**

Khadafy Mullens was broken before he was born. His mother, Cassandra Washington, avoided prenatal vitamins and care in favor of cigarettes and alcohol. PCR/2072–75. While pregnant with Mullens, she routinely began drinking at 9 o’clock in the morning while playing card games with friends. PCR/2075. She also regularly used marijuana and cocaine while pregnant with Mullens. PCR/2071.

Once Mullens was born, his life spiraled into a cycle of violence, malnutrition, poverty, and abuse. Mullens’s mother had four children on welfare and food stamps. R8/1244–62. She drank heavily, smoked marijuana, and suffered from major depression during his childhood. R7/1105–06; R8/1252. Mullens’s father, Mohamad Ibrahim, was addicted to heroin and cocaine, and suffered from bipolar disorder and

post-traumatic stress disorder (PTSD). R8/1264–65. When household food went from scarce to nonexistent, Ibrahim took Mullens to the store to steal food. R8/1267. Ibrahim would regularly steal money from the family to support his drug habit, often resulting in utilities being shut off or evictions. R7/1119; R8/1250; R8/1266. One time, Ibrahim unplugged the television while his children were watching and carried it off to sell it for drugs. R8/1267. Mullens and his siblings were regularly left alone while their mother worked and their father was out using drugs. R8/1270–71.

Domestic violence was a daily occurrence. Ibrahim would become violent between his drug fixes and regularly beat and strangled Washington in front of their children. R8/1248; R8/1266–68. One of Mullens's earliest memories was watching his father choke his mother while screaming obscenities in her face. PCR/2998. His father once repeatedly punched his mother and knocked her teeth out as Mullens looked on. PCR/2998. Mullens was present for many of these brutally violent episodes; he would cry loudly, begging his father to stop hurting his mother. R8/1268. Ibrahim also beat his children and was verbally abusive towards the entire family. R8/1268–69. The violence often came without warning. R8/1249.

When Mullens was five years old, Ibrahim went to prison for attempted murder. R7/1120; R8/1265. Family life did not improve in Ibrahim's absence. Mullens's mother became a part-time student in addition to her employment, and with her increased absence the children were left to fend for themselves. R8/1190;

R8/1223; R8/1247. Their home was filthy and bug-infested; the children often went hungry; and they were teased at school for their shabby clothes. R8/1184–96. During Mullens’s early childhood, the family moved from one decrepit house to another, and was at one point homeless. R7/1110–11. Without supervision, Mullens’s older brother Wesley mimicked what he had learned from their father. PCR/2998–99. Wesley tortured Mullens, hitting him hundreds of times, dropping horseshoes on his head from a tree, beating him with curtain rods, sticking him with darts, and slamming his body into concrete. PCR/1365–66. Wesley would often put Mullens in a chokehold until he passed out. R8/1232–34.

Mullens’s home life deteriorated even further when Mullens’s mother married a violent, alcoholic pedophile named Levi McClendon. McClendon sexually abused Mullens dozens of times over several years. On one occasion, when Mullens was only six years old, he woke up to McClendon anally penetrating him with his fingers; McClendon then forced Mullens to masturbate him until he ejaculated. PCR/2992. On another occasion, Mullens went into the bathroom to use the toilet while McClendon was in the shower. *Ibid.* McClendon came out of the shower, helped six-year-old Mullens balance on the toilet seat, and then orally penetrated Mullens and ejaculated in Mullens’s mouth. *Ibid.* McClendon would regularly send Mullens to his room when his mother was not home and anally penetrate Mullens or force Mullens to fellate him. PCR/3133–34. Even publicly, McClendon was “flamboyant”

with Mullens and would touch him inappropriately. R8/1217–18. Several family members recognized McClendon’s treatment of Mullens to be abuse, with one describing McClendon as “a total perv.” PCR/3017. Mullens wondered why his mother never found out about the ongoing sexual abuse and later suspected his mother had prostituted him in return for McClendon’s favors. PCR/3134. When McClendon wasn’t sexually abusing Mullens, he was physically abusing him. Even Mullens’s mother recognized that “McClendon hated [Mullens] more than he hated her other children[,] and he would always make an example out of [Mullens].” PCR/2999.

By the time Mullens was in the third grade, his teachers noticed severe learning and emotional problems. Mullens’s smile could light up a room, but his mood swings were difficult for his teachers to handle. PCR/2050–52. Mullens had trouble with social cues, could not understand classroom rules, and was reading and writing far below grade level. PCR/2052–54. Mullens also had a poor memory, paltry vocabulary, and difficulty understanding concepts. PCR/1361–62. He always wore the same dirty white t-shirt and jean shorts to school. PCR/2055. Mullens was referred to a dropout-prevention program for the lowest-performing children in the fourth grade. PCR/2057. His scholastic record was poor, but despite earning four Ds and a C in the sixth grade, he was “socially promoted” to seventh grade. PCR/2506–

07. Mullens never progressed past the ninth grade. Juvenile boot camp records described Mullens as “slow and lack[ing] ... cunning.” PCR/1369.

Mullens was gullible and inarticulate and could not recognize sarcasm. PCR/1618–22; R8/1273. He could understand basic rules of games, but he lost over and over. PCR/1620–24. It was easy to persuade him to do something or talk him out of something. R8/1194–95; R8/1272. He was impulsive as a child and never understood consequences. R7/1124; R8/1194. He was shunned, taken advantage of, and manipulated his whole life. For example, Mullens’s older sister, Sandra, would get him to steal candy for her when he was just eight years old. PCR/3011. And Mullens’s older brother, Wesley, once convinced Mullens to break into a neighbor’s garage and steal bicycles. PCR/939. “*Everyone* took advantage of [Mullens] in this way.” PCR/3011.

From a young age, Mullens had sensory-processing problems and was extremely sensitive to light, loud noises, and cold temperatures. PCR/1396–97; PCR/3007. Mullens failed to meet developmental milestones and has an odd, duck-like gait. PCR/3007. Serial head traumas snuffed out any remaining opportunity for normal brain development. Aside from the brutal attacks to the head by Wesley, Mullens often hit his head into the pavement during street football games and when he fell out of trees. PCR/1623. Throughout his early life, Mullens suffered numerous other head injuries: he lost consciousness after being clotheslined while biking,

injured his head in a car crash, and slammed his head into walls in an attempt to stop the voices in his head. PCR/1365–66.

Mullens began talking to himself around 14 or 15 years old and appeared lost in his own world. R8/1235–36. Mullens would talk to himself, laugh, and clap, could not focus, and spoke illogically. R8/1257–59. Mullens developed peripheral vision issues and hallucinations. PCR/1368. He began using marijuana, crack cocaine, and alcohol, and huffed aerosols around this time. R8/1236–37; PCR/2265. By age 15, Mullens was depressed and hyper or manic. R7/1137. Mullens’s mother threw him out of the house at age 15, and he ended up living in a drug-infested hotel. R7/1138.

Mullens was sent to an adult prison when he was only 16 years old. R8/1256–57. When he was released at age 18, “Khadafy [Mullens] came home a different person.” PCR/3035. Mullens would not speak; he was paranoid, hypervigilant, and was missing a tooth. R8/1238–39. Mullens developed an abnormal startle reflex and would scream and cry when family tried to wake him up from sleep, as if someone were brutalizing him. PCR/2996. Mullens was convinced that people were after him and that they wanted to sexually abuse him. R7/1139. Mullens also refused to bathe or comb his hair, spent hours staring into space, and would not sleep at night. R7/1139–40; R8/1257. Mullens’s behavior was so bizarre that his neighbors petitioned to get him to leave, and his own mother contemplated poisoning him to put him out of his misery. R7/1141–42.

Mullens went back to prison and was released in September 2007. Upon his release, the Florida Department of Corrections referred Mullens to Gulf Coast Community Care, which diagnosed him with bipolar disorder (most recent episode depressed), schizophrenic paranoid type. R9/1341. Mullens's hygiene was terrible; his habits were strange; he talked to himself and acted as if he were hearing voices. R8/1258–59. Mullens would laugh to himself at inappropriate times. R8/1211. He lacked basic skills. He never learned to drive a car. PCR/1363; PCR/1372. Mullens was “childlike” as an older teen, playing with toy figurines. PCR/1666. He could not hold down a job, write a check, manage a bank account, cook a full meal, or do laundry. PCR/1372. Mullens could not master basic vocational skills. PCR/2346. Mullens was even unable to complete his own Social Security Disability Application without assistance from his mother. PCR/2077.

On August 6, 2008, eleven days before the crime, Mullens attended a Mental Status Examination at Suncoast Community Health. R11/1712–35. He reported wide mood swings and poor impulse control, but no homicidal ideation; in the words of Nancy Wyatt, A.R.N.P.: “In my opinion, [Mullens] is not an imminent danger to self or others.” R11/1733. He was diagnosed with bipolar disorder and given antipsychotic medication. *Ibid.*

On August 11, 2008, six days before the crime, Levi McClendon, the man who repeatedly sexually assaulted Mullens as a child, was killed in a train accident.

PCR/2799; PCR/2855. Mullens’s mother told him he was expected to attend the funeral of his childhood rapist on Monday, August 18, 2008. PCR/2799. Some of Mullens’s family members were shocked by his mother’s insistence that he attend the funeral. *See, e.g.*, PCR/3017 (“Sandy should never have tried to take Khadafy [Mullens] to Levi’s funeral ... that is ridiculous. She was just in denial. She knew Khadafy was being sexually abused by Levi.”).

### **B. The Underlying Offense**

The crime occurred on Sunday, August 17, 2018, the day before Mullens was supposed to attend the funeral of his childhood rapist.<sup>1</sup> That day, Mullens smoked crack and drank over a dozen beers. *See* R8/1285–89; PCR/363. At some point he met an acquaintance, Spencer “Slim” Peeples, who had been asking around for someone to help him rob a nearby convenience store. *See Mullens*, 197 So. 3d at 20. Peeples convinced Mullens to accompany him to the store. *Ibid.* Mullens reported that, prior to the robbery, Peeples told him that he wanted to kill the store owner to settle a grudge and that he wanted to steal the store safe, which Peeples said had \$15,000 in it. PCR/3857; *see Mullens*, 197 So. 3d at 22 (referring to a grudge Peeples had with another store owner).

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<sup>1</sup> A full recitation of the facts surrounding the underlying offense is found in this Court’s opinion on direct appeal, *Mullens v. State*, 197 So. 3d 16, 20–22 (Fla. 2016), which is reproduced in the State’s opening brief. *See* State Br. 1–9.

Security-camera footage showed that Peeples directed the robbery. PCR/3857. When Peeples and Mullens entered the store, there were two people inside, a clerk, Mohammed Uddin, and a customer, Ronald Hayworth. *Mullens*, 197 So. 3d at 20–21. Peeples initiated the robbery by pulling his gun on Uddin. PCR/3857. Peeples appeared to be directing Mullens and yelling at Uddin. *Ibid.* Peeples directed Mullens to lock the door. *Ibid.* Peeples did most of the talking during the robbery. *Ibid.* And Peeples demanded Uddin’s car keys. *Ibid.* Peeples later reported to law enforcement that he was the one who took the money out of the drawer; he was the one who took Uddin’s car keys; and he was the one who told Mullens “to hold them there until I get the car.” *Ibid.*

Up until this point, Peeples had been wielding the gun. *Ibid.* But when Peeples went to get Uddin’s car, Peeples gave Mullens his gun and told him to keep it pointed at Uddin. PCR/3857–58. At one point, when Mullens opened the door and leaned outside, Uddin reached for a telephone and dialed a number. *Mullens*, 197 So. 3d at 21. Mullens saw the movement and ran toward him with the gun pointed at Uddin. *Ibid.* A struggle ensued, and Mullens shot both Uddin and Hayworth. *Ibid.* As Mullens was leaving the store, another customer, Albert Barton, was entering, and Mullens shot him as well. *Ibid.* Uddin and Hayworth died from their injuries, and Barton was seriously wounded but survived. *Ibid.*

## **II. PROCEDURAL BACKGROUND**

### **A. Pretrial Proceedings**

#### **1. Mullens receives inadequate pretrial representation from inattentive and unqualified counsel.**

In 2008, the Public Defender for the Sixth Judicial Circuit assigned Mullens's case to Dudley Clapp, the office alcoholic. Clapp regularly drank on the job and was eventually fired for his misconduct. PCR/1727–28; PCR/2747–49. Yet even despite his own impairment, Clapp immediately knew Mullens had a mental defect. “[J]ust by interacting with him,” he could tell that something wasn’t right. PCR/2739–40. In 2008, Clapp requested funds to hire neuropsychologist Dr. Michael Gamache because he suspected something was “definitely wrong” with Mullens’s brain. PCR/2740–41; PCR/4025–26. Apparently, Dr. Gamache did nothing to advance a diagnosis until three years later, in October 2011, when he finally examined Mullens and informed the trial team of the possibility of frontal lobe brain damage. PCR/3049–51.

Attorney Jill Menadier was also assigned to Mullens’s case in 2008. PCR/1421. But Clapp worked as if she was “not there.” PCR/1426–27. He would not inform her of hearings and effectively shut her out of the case. *Ibid.* In 2009, during the time when counsel should have been conducting pretrial investigations, Menadier’s long-term partner died suddenly. PCR/1502–03. Menadier suffered serious chronic depression as a result. *Ibid.* Menadier was disabled from work due

to heavy use of antidepressants for some time in 2009, during pretrial investigations. *Ibid.* It wasn't until five or six years later, after Mullens's case resulted in a death sentence, that Menadier was finally prescribed a cocktail of anti-depressants that made her "feel normal" again. PCR/1502. She later admitted: "At the time, I didn't realize how depressed I was ... and when I got on the correct cocktail of medications ... I realized how incredibly depressed I had been[,] and *it clearly affected my work.*" PCR/1503–04 (emphasis added). Specifically, Menadier noted that her "mistakes" in the case included "not doing any kind of brain imaging, neuropsych workup, not following through on the indicators of autism, and PTSD." PCR/1505.

First Assistant Public Defender Ron Eide began work on Mullens's case in September 2010, after Clapp was terminated and just *two months* before Mullens's capital murder trial was to begin. PCR/3115. Eide had extensive experience with capital defense and had worked on cases involving brain damage, PTSD, and fetal alcohol spectrum disorder (FASD). PCR/1723–24. Mullens's low intellect and "goofy" affect gave Eide immediate concerns about his competency. PCR/1740–43. Eide remarked that even two years after being charged with capital murder, Mullens did not seem to understand the gravity of his situation. PCR/1773. Although trial was scheduled to begin in less than two months, in November 2010, Eide noticed that Clapp, the day-drinking chronic alcoholic, had neglected to hire a psychologist or psychiatrist during more than a year working the case—despite knowing

immediately that there was something “definitely wrong” with Mullens. PCR/1743. Eide remarked that it could not possibly have been good strategy to wait to consult an expert until eight weeks before a capital trial. *Ibid.* Eide normally hires experts, “[t]he day I get the client,” because it is difficult to find qualified experts with experience in death penalty cases on shorter notice. *Ibid.* Eide thought Mullens’s case was “hopeless” and referred to Mullens around the office as “Dead man walking.” PCR/1639.

In a last-minute effort to compensate for Clapp’s booze-fueled neglect, the defense team hired Scot Machlus, Ph.D., a psychologist. Dr. Machlus had never testified in a capital case before. Dr. Machlus performed personality testing, IQ testing, and a few other assessments, and testified at Mullens’s competency and sentencing hearing. Dr. Machlus had no training in neuropsychology, and he did not have the expertise to diagnose brain damage. R13/2153–92. Perhaps as a result, Dr. Machlus consistently ignored evidence of neurological dysfunction, brain damage, fetal alcohol spectrum disorder, PTSD, and other factors that would have been critical to a competent mitigation presentation.

Eide was aware that Dr. Machlus did not possess the critical expertise of a neuropsychologist when he hired him. PCR/1745. Eide was more focused on competency than brain damage. *Ibid.* But Menadier, who was in charge of preparing the penalty-phase mitigation presentation, mistakenly believed that Dr. Machlus was

a neuropsychologist who was competent to assess Mullens's brain dysfunction. PCR/1499–50; PCR/1674. She was wrong.

Tiffany Lawrence Cunningham, who began work on Mullens's case in 2011, is a licensed clinical social worker with a master's degree and a specialty in capital mitigation. She began interviewing witnesses, researching records, and investigating all possible avenues of mitigation. PCR/2991–3035. Cunningham discovered and disclosed to counsel McClendon's sexual abuse as a basis for a diagnosis of PTSD. PCR/2992. Cunningham found that Mullens had all of the classic symptoms of PTSD, including flashbacks, nightmares, hypervigilance, and an abnormally high startle response, and recommended follow-up tests for PTSD. PCR/1369–70; PCR/2994; PCR/3025. Cunningham also recognized the signs of brain damage and recommended further diagnostic tests and brain scans, including "DTI vs. QEEG vs. SPECT SCAN vs. MRI." PCR/1367–68; PCR/1388–89; PCR/2993; PCR/3004; PCR/3034–35. None of those tests or brain scans were carried out.

When Eide retired in September 2011, Michael Hays joined the defense team. Hays had experience working with neuropsychologists in head injury cases before practicing with the Public Defender. PCR/1777. He had experience with intellectual disability, fetal alcohol spectrum disorder, PTSD, and brain damage in hundreds of criminal cases. PCR/1779–80. But Mullens was the only person he ever represented to receive a death sentence. *Ibid.* Hays found Mullens was the "worst client he ever

had” as far as helping with case strategy. PCR/1781. Mullens was difficult to work with, inappropriate, incompetent, and “almost impossible to have a cogent conversation with.” *Ibid.* Mullens could never follow even simple directions from his lawyers, and he refused, despite his lawyers’ pleas, to stop writing inappropriate letters to Judge Federico. PCR/1783.

Allison Miller started working as the third-chair lawyer on Mullens’s case sometime in 2011, although she did not become death-qualified until 2017.<sup>2</sup> PCR/1627–30. When she joined the team, she did not know the difference between a psychologist and a neuropsychologist. PCR/1673. While she wanted to help defend people facing capital punishment, considering her lack of experience, she did not think anyone expected her to actually contribute to Mullens’s defense. PCR/1631. Miller described the capital defense team structure within the office in bleak terms: “We had a handful of lead counsel attorneys who really weren’t doing a whole lot dependent upon the second and third chairs who didn’t know what they were doing, myself included.” PCR/1633–34. Miller was handling a full caseload of 100 or more felony cases along with additional responsibilities for capital cases when she volunteered to work on Mullens’s case. PCR/1634.

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<sup>2</sup> Any further ramifications of a finding of ineffective assistance of counsel should not inure to Miller, a third-chair attorney who was not death-qualified until years after Mullens was sentenced to death.

**2. Mullens pleads guilty and waives his jury right while on sedatives and without understanding the meaning or consequences of his waivers.**

In early 2013, defense counsel advised Mullens to “plead open” to capital murder—that is, to plead guilty *without* a negotiated sentence from the State Attorney. PCR/1433–34; PCR/1646. Trial counsel had never, before or since, “pled a client open.” PCR/1646. And counsel was not aware of “anybody” else who had “pled open.” PCR/1735. As counsel later admitted, this was because “pleading open” surrenders something valuable (the chance of being acquitted at trial) without seeking anything in exchange, and “[t]hat’s something you really shouldn’t do.” PCR/1790. Counsel also advised Mullens to waive his right to a sentencing jury, assuring Mullens that Judge Federico was unlikely to sentence him to death. PCR/1436–40.

Mullens’s younger sister Kendra died of a drug overdose in February 2013, in the midst of Mullens’s plea discussions with counsel. PCR/1653. Mullens was “devastated.” *Ibid.* He developed depression so severe he could hardly speak without slurring. PCR/2069–70. He was placed on psychiatric observation and suicide watch one day before signing a defense memorandum indicating that he would plead guilty without a negotiated sentence. PCR/3277. On postconviction review, Dr. Michael Maher reviewed the medical records that trial counsel had neglected to request from the Pinellas County Jail and found that Mullens had been prescribed 8 mg of

perphenazine twice per day, for a total of 16 mg per day, in the timeframe of his plea discussions with counsel and the court. PCR/2223; PCR/3130–31; PCR/3166–3308. Perphenazine is “an incredibly powerful mind-altering sedative,” and 16 mg is the maximum daily outpatient dose permitted under medical guidelines. Dr. Maher testified that “[i]f I gave 16 milligrams of that drug to a patient in my office, I would not expect them to have any idea what was going on.” PCR/2223.

In fact, all of the professionals on Mullens’s team had continuing concerns about his ability to understand consequences, meaningfully consult with counsel, and make informed decisions. PCR/1656–58; PCR/1730–31; PCR/1740; PCR/1794. Menadier took notes of plea discussions on April 9, 2013, but she was not present for many of the plea discussions because she was hospitalized and absent from the office for two weeks in April 2013. PCR/1443–44; PCR/3040. When Mullens was tested during postconviction proceedings, he was found to have extremely low verbal comprehension scores. PCR/2202–04. People with low verbal comprehension scores are inclined to be agreeable, answer questions in the affirmative, and answer “yes, Sir” without any real understanding of what assent means. *Ibid.* There was thus “no telling” if Mullens understood his appellate rights or the benefits and detriments of pleading open. PCR/1797.

The trial court accepted Mullens’s guilty plea and jury waiver, and the case proceeded to sentencing. Op. 1 (PCR/2921).

## **B. Sentencing Proceedings**

### **1. Trial counsel fails to present all of the mitigating evidence.**

Mullens's sentencing proceedings were held before Circuit Judge Philip J. Federico, without a jury. Trial counsel presented twelve lay witnesses and one expert witness, Scot Machlus, Ph.D., a psychologist. As described the postconviction court:

The defense focused on Mr. Mullens' life in poverty, beatings from his older brother, and his father teaching him to steal at a young age thereby extinguishing the distinction between right and wrong. Further presentation included Mr. Mullens' inability to comprehend consequences, parental neglect and drug use, Mr. Mullens' own substance abuse, sexual abuse, and his mental illness. Dr. Machlus, a forensic psychologist, was the only expert witness for the defense. Dr. Machlus met with Mr. Mullens' mother, father, and spoke to one of his sisters and one of his aunts over the phone. Dr. Machlus performed the WAIS-IV, the Woodcock-Johnson Normative Update Test of Achievement, the Woodcock-Johnson III Normative Test of Cognitive Abilities, the Minnesota Multiphasic Personality Inventory, the Personality Assessment Inventory, and the Structured Interview of Reported Symptoms. Dr. Machlus diagnosed Mr. Mullens with bipolar I disorder, a personality disorder and polysubstance dependency.

Op. 10 (PCR/2930).

Dr. Machlus testified that Mullens had an IQ of 83 based on his administration of the Weschler Adult Intelligence Scale IV (WAIS-IV). *Ibid.*<sup>3</sup> But counsel put on no evidence that Mullens has an intellectual disability. "There was simply no presentation as to Mr. Mullens' adaptive deficits during the penalty phase, let alone

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<sup>3</sup> That score was artificially inflated because Dr. Machlus improperly administered the test. Op. 11, 24 (PCR/2931; PCR/2944); *see infra* Statement of the Case Section II.D.1; Argument Section I.A.2.b.iii.

whether they occurred prior to the age of 18.” Op. 12 (PCR/2932). Nor did counsel present any evidence that Mullens’s mother drank while she was pregnant, that Mullens suffered from fetal alcohol spectrum disorder, that Mullens had suffered repeated head trauma, that Mullens had organic brain damage, or that Mullens suffered from PTSD. *See infra* Statement of the Case Section II.D.1; Argument Section I.A.2. Dr. Machlus likewise failed to identify any of these tell-tale signs of intellectual disability and brain damage. With respect to Mullens’s sexual abuse at the hands of his stepfather, counsel put on speculative testimony from Mullens’s relatives that they suspected abuse, as well as Dr. Machlus’s testimony that Mullens had told him about the abuse; but Dr. Machlus also testified that Mullens might be malingering. Op. 10 (PCR/2930).

Counsel put on no evidence of Mullens’s mental state at the time of the crime, and there was no explanation for how his mental state affected his conduct. In particular, counsel failed to connect the sudden death and impending funeral of his childhood rapist to his extreme acute mental and emotional distress. The trial court explained that “th[is] lack of specificity le[ft] the court to speculate as to [Mullens’s] condition and mental state” at the time of the crime. R15/2307.

## **2. Judge Federico sentences Mullens to death.**

Judge Federico issued his sentencing order on August 23, 2013.<sup>4</sup> The court found three aggravating circumstances with respect to both murders: (1) Mullens had been convicted of prior violent felonies; (2) the capital felonies were committed during the course of a robbery and for pecuniary gain; and (3) the capital felonies were committed for the purpose of avoiding lawful arrest. The court assigned great weight to each aggravating circumstance.

The court found two statutory mitigating factors and gave them only moderate weight: (1) the capital felony was committed while Mullens was under the influence of extreme mental or emotional disturbance; and (2) Mullens's capacity to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was substantially impaired. Regarding nonstatutory mitigation, the court explained that of the 31 circumstances that Mullens presented as mitigation, 16 had been addressed as statutory mitigation and would not be reconsidered as nonstatutory mitigation.<sup>5</sup> The trial court then consolidated the remaining nonstatutory mitigating

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<sup>4</sup> The court's sentencing is found at R15/2284–326, and was summarized by this Court on direct appeal, *see Mullens*, 197 So. 3d at 24–25.

<sup>5</sup> These 16 factors were: (1) genetic predisposition to psychological disorders; (2) genetic predisposition to substance dependency; (3) exposure to parental conflict; (4) exposure to and victim of child abuse and neglect; (5) poor parental attachment; (6) exposure to family drug and alcohol abuse; (7) exposure to family criminal behavior; (8) abuse at the hands of his older brother; (9) residential instability;

circumstances and found the following: (1) Mullens had not proven that he was sexually abused as a child and while in prison (this factor was accordingly given no weight); (2) his mental illness can be successfully treated (some weight); (3) he is immature, impulsive, and easily manipulated (little weight); (4) he had acted under the domination and control of his codefendant, Spencer Peeples (some weight); (5) he has a low IQ and poor academic achievement scores (little weight); (6) he accepted responsibility for his crimes (little weight); (7) his family and friends love and support him (little weight); (8) Mullens had not proven that he was “too far gone to be helped” at ten years old (no weight); and (9) he was named after Muammar Gaddafi (not mitigating and given no weight).

After weighing the aggravating and mitigating evidence, Judge Federico sentenced Mullens to death for the murders of Uddin and Hayworth, and to life imprisonment for the attempted murder of Barton.

### **C. Appellate Proceedings**

On direct appeal, this Court affirmed Mullens’s convictions and sentences but remanded the case for entry of a retroactive written order of competency in accordance with the trial court’s oral finding. *See Mullens v. State*, 197 So. 3d 16

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(10) impoverished childhood; (11) poor academic performance; (12) incarceration as a juvenile in an adult facility; (13) diagnosis of bipolar disorder; (14) diagnosis of polysubstance abuse; (15) diagnosis of a personality disorder; and (16) having been taught to commit crimes when he was five years old by his father.

(Fla. 2016). The trial court entered a written order *nunc pro tunc* on September 14, 2016. Mullens timely filed a petition for writ of certiorari, which the U.S. Supreme Court denied. 137 S. Ct. 672 (2017).

#### **D. Postconviction Proceedings**

##### **1. Postconviction counsel uncovers substantial new mitigating evidence that was never investigated by trial counsel.**

Mullens timely filed his Rule 3.851 motion on December 18, 2017, and his amended motion on May 15, 2018, and the case proceeded to an evidentiary hearing in March 2019 before Judge Federico—the same judge who sentenced Mullens to death.

Mullens called 13 witnesses at the hearing: Tiffany Lawrence Cunningham, the mitigation specialist and licensed clinical social worker who had worked on Mullens’s case; Dudley Clapp, co-counsel at the trial level; Jill Menadier, co-counsel at the plea and penalty phases; Allison Miller, third chair at the plea and penalty phases; Ron Eide, co-counsel at the trial level; Michael Hays, co-counsel at the plea and penalty phases; Dr. Michael Maher, a medical doctor; Dr. Robert Ouaou, a Ph.D. in neuropsychology; Dr. Joseph Wu, a medical doctor specializing in neuropsychiatry and neurocognitive imaging; Mohammad Ibrahim, Mullens’s father; Kenneth Mullens, Mullens’s paternal uncle; James Mullens, Mullens’s first cousin; and Kathryn Adikes, Mullens’s third-grade teacher.

The State called only one witness: Dr. Lawrence Holder, a medical doctor specializing in diagnostic radiology and nuclear medicine.

At the six-day postconviction hearing, Mullens presented, for the first time, evidence that he suffers from fetal alcohol spectrum disorder, Op. 17–19 (PCR/2937–39), which “Dr. Maher testified ... is a neuro-developmental condition, meaning that it affects the neurological development of an individual in a variety of harmful ways, and is caused by alcohol exposure in utero,” Op. 18 (PCR/2938). The postconviction court also heard, for the first time, that Mullens suffers from PTSD related to his childhood trauma and sexual abuse. Op. 16–17 (PCR/2936–37). Dr. Maher testified that PTSD produces symptoms that he identified in Mullens, including “impulsivity, anxiety, lack of ability to plan ahead, lack of appreciation for other people’s well-being, ... a feeling of self-centeredness[,] ... school failure, [and] unjustified or exaggerated emotional rage.” Op. 17 (PCR/2937). With regard to Mullens’s childhood sexual abuse, the court heard, for the first time, evidence that Mullens was not malingering and that Mullens’s PTSD and compulsive sexual behavior corroborate his trauma. Op. 10, 17 (PCR/2930; PCR/2937). Dr. Maher explained that when Mullens compulsively masturbated (or mimicked masturbating) while describing his sexual abuse, those involuntary movements were a “primitive, programmed, repetitive motor activity seen in a lot of severe brain conditions where

people get stuck on something ... when they are particularly stressed from that memory, experience, or trauma.” PCR/2144–45.

The postconviction court also heard new evidence that Mullens suffers from intellectual disability and organic brain damage. Florida law protects intellectually disabled people from execution if they are found to have significantly subaverage general intellectual functioning, existing concurrently with deficits in adaptive behavior that manifested in the period between conception and age 18. *See* Fla. Stat. Ann. § 921.137(1).<sup>6</sup> Mullens presented evidence establishing that he has an IQ consistent with a diagnosis of intellectual disability. Op. 10–11 (PCR/2930–31). The highest IQ ever recorded for Mullens was an inflated score of 82 on an improperly administered examination. Op. 11 (PCR/2931).<sup>7</sup> On postconviction review, Mullens’s neuropsychology expert, Dr. Ouaou, properly administered the WAIS-IV, and Mullens scored a 73. Op. 11, 24 (PCR/2931; PCR/2944). Dr. Ouaou concluded

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<sup>6</sup> “Significantly subaverage general intellectual functioning” is based on a person’s intelligence quotient or “IQ,” and is defined as “two or more standard deviations from the mean score on a standardized intelligence test.” Fla. Stat. Ann. § 921.137(1). Florida law defines “adaptive behavior” as “the effectiveness or degree with which an individual meets the standards of personal independence and social responsibility expected of his or her age, cultural group, and community.” *Ibid.*

<sup>7</sup> This IQ test was administered by Dr. Machlus, who admitted that he had administered the test in multiple sessions over multiple days, contrary to the test’s instructions. R10/1429–30; *see infra* Argument Section I.A.2.b.iii.

that Mullens has an IQ consistent with intellectual disability. Op. 11, 24 (PCR/2931; PCR/2944). The State put on no evidence to rebut this fact.

Mullens also put on evidence establishing that he suffered from adaptive deficits prior to age 18. Deficits in *one* of three domains—conceptual, social, or practical behavior—are sufficient for a finding of intellectual disability. *Moore v. Texas*, 137 S. Ct. 1039, 1050 (2017); Am. Ass’n on Intellectual & Developmental Disabilities, *Intellectual Disability: Definition, Classification, and Systems of Supports* 43 (11th ed. 2010) (hereinafter “AAIDD-11”); Am. Psychiatric Ass’n, *Diagnostic and Statistical Manual of Mental Disorders* 33 (5th ed. 2013) (hereinafter “DSM-5”). Dr. Ouaou gathered information from multiple sources to assess Mullens’s adaptive functioning. This is critically important in diagnosing intellectual disability because intellectually disabled people notoriously describe their own deficits inaccurately, under a “cloak of competence.” PCR/2343; PCR/2350 (AAIDD-11 warns against self-reporting strengths); PCR/1586 (“[A]ll sorts of things we found out from collateral sources ... [Mullens] wanted to present himself as being normal. He didn’t like being different or perceived as being sick or disabled in any way.”). Dr. Ouaou reviewed school and institutional records; interviewed childhood friends and family; consulted with Mullens’s primary school teacher, Kathryn Adikes; and completed the Adaptive Behavior Diagnostic Scale (ABDS), a standardized test for adaptive functioning, with two people intimately

familiar with Mullens's childhood behavior, his mother, Cassandra Washington, and his uncle, Kenneth Mullens. PCR/2343–44. Mullens's scores on the ABDS were in the first percentile and demonstrated impairment in *all three* domains. PCR/2345. Before his incarceration he could not “drive a car, hold down a job, write a check, manage a bank account, or cook a full meal.” Op. 10–11 (PCR/2930–31). Dr. Ouaou found that before he was 18 years old, Mullens “had problems with speech and communication and he was highly sensitive.” Op. 11 (PCR/2931). He also found that, among other adaptive deficits, “Mr. Mullens did not pick up on social cues and had difficulty initiating or participating in group activities”; he had “difficulty learning vocational skills” and “managing money”; and he “had problems following direction, problems with time management, and had reading and writing issues.” *Ibid.* Mullens put on evidence establishing that he had experienced the onset of these symptoms “during the development[al] period,” that is, before he turned 18. Op. 11, 24 (PCR/2931; PCR/2944). On the basis of these findings, Dr. Ouaou diagnosed Mullens as intellectually disabled. Op. 11 (PCR/2931). Again, the State put on no rebuttal evidence.

Dr. Ouaou also testified, based on neuropsychological examinations of Mullens, that Mullens likely has organic brain damage. In Dr. Ouaou's assessments, Mullens demonstrated significant impairments in executive function, learning, memory, and language functioning. PCR/2271. Mullens was found to have severely

impaired executive function—in the first or second percentile. PCR/2273–74. His learning and memory scores on the California Verbal Learning Test and the Weschler Memory Scale fell below the first percentile. PCR/2276; PCR/3479–85. This pattern of test results indicates organic brain damage in the frontal limbic system and frontal lobe—which are highly relevant to mitigation because this part of the brain controls judgment, rationality, social comportment, following rules, reasoning through feelings, and impulse control. PCR/2288–90. The State did not proffer a neuropsychologist or offer any evidence whatsoever to counter Dr. Ouaou’s conclusion, based on neuropsychological testing, that Mullens suffers from brain damage.

The postconviction court also heard “conflicting” expert testimony regarding Mullens’s brain scans. Op. 16 (PCR/2936). Mullens called Dr. Joseph Wu to testify.<sup>8</sup> After reviewing Mullens’s PET scans and two types of MRI imaging (QV and DTI), Dr. Wu found that Mullens had “very significant” brain abnormalities consistent with fetal alcohol spectrum disorder, traumatic brain injury, and chronic traumatic encephalopathy (CTE). PCR/1840; PCR/3401–78; *see also* PCR Evidentiary

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<sup>8</sup> Dr. Wu graduated from Stanford Medical School with honors, finished his residency in psychiatry, and completed an additional two-year fellowship on brain imaging and neurocognitive disorders before joining the medical faculty at the University of California, Irvine. PCR/1827; PCR/3065–91. Unlike a garden-variety radiologist who diagnoses broken bones, 100% of Dr. Wu’s practice focuses on the brain, brain damage, and brain imaging. PCR/1829; PCR/3065–91.

Hearing, Defendant's Exs. 21 & 22 (CD-ROMs containing image files of Mullens's PET and MRI scans). Mullens's MRI showed decreased metabolism in the neocortex (frontal lobe) consistent with the neuropsychological deficits identified by Dr. Ouaou and diminished capacity to conform his behavior to the law. The damage to Mullens's corpus callosum—a harbinger of fetal alcohol spectrum disorder and traumatic brain injury—was greater than “about 1 out of 100 million to 1 out of a billion people.” PCR/1901. Brain scans showed gross abnormalities in Mullens's hippocampus, the center of learning and memory, and his amygdala, which regulates aggression. PCR/1904–05; PCR/3112. Dr. Wu testified that “maybe eight other people *on earth* would have a corpus callosum that small ... that's extraordinarily small, you know, consistent with severe damage.” PCR/1901–02 (emphasis added).

The State called Dr. Lawrence Holder.<sup>9</sup> Dr. Holder testified that, because neither Dr. Wu nor he had actually performed Mullens's PET scans, it was

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<sup>9</sup> Unlike Mullens's expert, Dr. Wu, Dr. Holder has no background in psychiatry. PCR/3936. “Areas of interest” on his CV include orthopedics, sports medicine, osteoporosis, and tumor imaging throughout the body. PCR/3937. The extensive list of presentations and publications in his CV, all of which are more than 16 years old, have nothing to do with *brain* imaging. *Ibid.*; PCR/2677–78. He received grant support for a Parkinson's study back in 2000, but he has never published anything on quantitative volumetrics, diffusor tensor imaging, or neuroimaging of the brain. *Ibid.* Dr. Holder admitted that he had never reviewed Mullens's medical records or school records prior to opining in the case and said he would defer to the opinion of a qualified neuropsychologist that Mullens's brain is damaged. PCR/2673–74; PCR/2679.

impossible to know whether the scans were properly administered. Op. 16 (PCR/2936). “As to the QV and DTI scans, Dr. Wu conceded that these are new tests[,] and[] Dr. Holder clarified that while the medical community has hope that these tests will assist in assessing brain damage and other neurological issues, the tests and their application are still in the research stages.” *Ibid.*

Finally, the postconviction court heard, for the first time, “a more cohesive presentation of Mr. Mullens’ mitigation evidence,” Op. 23 (PCR/2943), that explained how Mullens’s fetal alcohol spectrum disorder, intellectual disability and brain damage, history of sexual abuse, and PTSD affected his mental state at the time of the crime—on the day before he was expected to attend his rapist’s funeral.

**2. Judge Federico grants Mullens’s postconviction claim of ineffective assistance of counsel but denies his other claims.**

On August 21, 2019, Judge Federico granted Mullens’s postconviction motion with respect to his claim of ineffective assistance of counsel and denied Mullens’s other claims.

**a.** The postconviction court found that counsel was deficient for failing to investigate and present evidence of fetal alcohol spectrum disorder, intellectual disability and organic brain damage, sexual abuse, and PTSD:

[T]he Court finds the testimony and evidence as to the effects of brain damage from repeated trauma, testimony and evidence regarding a diagnosis of PTSD. and FASD for Mr. Mullens, and the testimony and evidence regarding Mr. Mullens’ possible intellectual disability to be credible and compelling to a mitigation presentation and, all were overlooked at the penalty phase.

Op. 23 (PCR/2943).

The court further held that counsel had failed to adequately supervise Dr. Machlus and wrongly relied on him to conduct examinations that he was unqualified to perform:

[T]he Court finds ... counsel's use of Dr. Machlus as their sole expert as well as their management of Dr. Machlus to be deficient. Dr. Machlus failed to adequately convey the mitigation factor that Mr. Mullens was sexually abused. Dr. Machlus apparently ignored the assessments and suggestions of the mitigation specialist. Additionally, counsel's reliance on Dr. Machlus, a psychologist, rather than also using a neuropsychologist, as a multitude of factors indicated counsel should have consulted and used, was deficient.

Op. 9 (PCR/2929).

Finally, Judge Federico concluded that, if Mullens's counsel had presented all of the mitigating evidence at sentencing, *he would not have sentenced Mullens to death*: "The Court further finds that absent the deficient performance, the sentencer would have concluded that the balance of aggravating and mitigating circumstances did not warrant death." Op. 9 (PCR/2929).

**b.** The postconviction court denied Mullens's other claims. With regard to Mullens's claim that his plea and jury waiver were involuntary, the court "f[ound] that Mr. Mullens' plea and waiver were entered knowingly, voluntarily, and intelligently," and that, notwithstanding his heavily medicated state, any effect from his sister's death had been attenuated by the time he formally entered his plea and waiver. Op. 8 (PCR/2928).

With regard to Mullens’s intellectual disability claim, the postconviction court “f[ound] that Mr. Mullens presented a persuasive case of intellectual disability at the evidentiary hearing,” and that “the State did not put on a case to rebut Mr. Mullens’ experts except as to the brain scans.” Op. 25 (PCR/2945). Nevertheless, the court denied Mullens’s claim:

At this procedural posture, the Court defers a dispositive ruling as to Mr. Mullens’ potential intellectual disability as a bar to the death penalty until he files the appropriate motion under Florida Rule of Criminal Procedure 3.203 during the new penalty phase, assuming the State still decides to seek the imposition of a death sentence. This Claim is denied at this time.

*Ibid.*

## **SUMMARY OF ARGUMENT**

**I.A.** The postconviction court correctly determined that trial counsel rendered deficient performance at Mullens’s sentencing proceedings. Ignoring numerous and obvious red flags, counsel failed to investigate and present evidence of fetal alcohol spectrum disorder, intellectual disability, organic brain damage, sexual abuse, and post-traumatic stress disorder (PTSD). Counsel then failed to explain to the sentencing judge how Mullens’s mental deficiencies and trauma had affected his mental state at the time of the crime. And counsel relied on an unqualified expert witness, who failed to identify organic brain damage, failed to administer psychological tests according to professional standards, made errors in scoring tests, failed to diagnose fetal alcohol spectrum disorder, and failed to

diagnose PTSD. The result was a mitigation presentation that was incomplete and unpersuasive, and that ultimately backfired disastrously. Taken individually or collectively, these errors amount to clear deficient performance.

**I.B.** Not only was trial counsel's performance deficient; it was also highly prejudicial. The same judge who originally sentenced Mullens ruled on postconviction review that, had counsel presented all of the mitigating facts at sentencing, he would not have sentenced Mullens to death. Such a determination necessarily demonstrates that trial counsel's deficient performance prejudiced Mullens. And it undermines any confidence that this Court or the public can have in Mullens's death sentence. Beyond that, Mullens adduced overwhelming and unrebutted evidence on postconviction review that he suffers from fetal alcohol spectrum disorder, intellectual disability, organic brain damage, and PTSD related to childhood sexual and physical abuse and assaults in prison. And postconviction counsel explained—for the first time—how Mullens's trauma and mental health problems had affected his decisionmaking (or lack thereof) on the day before his childhood rapist's funeral. That new mitigating evidence fundamentally changed the balance between mitigation and aggravation, rendering it *at least* reasonably likely that he would have been sentenced to life in prison, rather than death.

**II.** The postconviction court erred by summarily denying Mullens's intellectual disability claim. If a movant proves he is intellectually disabled at an

evidentiary hearing on a Rule 3.851 motion, the only remedy is to find him intellectually disabled, vacate the death sentence, and resentence the defendant. Yet, here, the postconviction court declined to hold that Mullens is intellectually disabled, even though it concluded that “Mr. Mullens presented a persuasive case of intellectual disability.” Op. 25 (PCR/2945). Instead, it denied Mullens’s motion. Given the postconviction court’s own factual findings, this Court should order the postconviction court to vacate Mullens’s death sentence in light of his intellectual disability. At minimum, the Court should order the postconviction court to appropriately weigh the evidence and make a finding.

**III.** Trial counsel advised Mullens to plead guilty without a plea deal and to waive his right to a sentencing jury. They did so (1) in the face of obvious signs that Mullens lacked the capacity to enter a voluntary plea; (2) despite having not investigated critically important mitigation evidence that could have been presented to the jury; (3) based on representations that the trial judge would not impose a death sentence, which turned out grievously wrong; and (4) ignoring that forgoing a sentencing jury meant forgoing any possibility of relief should the law governing sentencing juries change, as it did just two years later in *Hurst v. Florida*, 136 S. Ct. 616, 622 (2016). Advising Mullens to waive his rights in these circumstances amounted to ineffective assistance of counsel and caused severe prejudice; the

postconviction court should have vacated Mullens's conviction and sentence on that basis.

**IV.** The cumulative effect of counsel's numerous errors at both the guilt and penalty phases deprived Mullens of his constitutional right to a fundamentally fair proceeding, guaranteed under the Sixth, Eighth, and Fourteenth Amendments and corresponding provisions of the Florida Constitution. Accordingly, even if the Court is not persuaded that relief should be granted on any one of Mullens's claims, in light of those errors' cumulative effect on the trial proceedings, the Court should vacate Mullens's plea, jury waiver, and conviction, and order the postconviction court to grant Mullens new guilt and penalty phases.

#### **STANDARD OF REVIEW**

"When reviewing a postconviction court's ruling on an ineffectiveness claim, this Court employs a mixed standard of review, deferring to the trial court's findings on factual issues that are supported by competent, substantial evidence, and reviewing the trial court's legal conclusions de novo." *Ellerbee v. State*, 232 So. 3d 909, 919 (Fla. 2017).

This Court affords substantial deference to the trial court's factual findings, as well as its weighing (and reweighing) of the evidence. The Court has consistently "recognize[d] and honor[ed] the trial court's superior vantage point in assessing the credibility of witnesses and in making findings of fact." *Porter v. State*, 788 So. 2d

917, 923 (Fla. 2001). Accordingly, the Court has held that it “will not substitute its judgment for that of the trial court on questions of fact and, likewise, on the credibility of the witnesses and the weight to be given to the evidence by the trial court.” *Ibid.* When it comes to the Court’s “review[] [of] the weight given to mitigating factors” in particular, “this Court has stated that ‘[t]he relative weight given each mitigating factor is within the discretion of the sentencing court.’” *Walker v. State*, 957 So. 2d 560, 584 (Fla. 2007) (quoting *Trease v. State*, 768 So. 2d 1050, 1055 (Fla. 2000)).

## **ARGUMENT**

### **I. THE POSTCONVICTION COURT CORRECTLY DETERMINED THAT MULLENS MUST BE RESENTENCED**

#### **A. The Postconviction Court Correctly Determined That Trial Counsel Rendered Deficient Performance.**

Trial counsel had a duty to conduct a thorough investigation of Mullens’s social and medical history. *Andrus v. Texas*, 140 S. Ct. 1875, 1881 (2020) (per curiam). They failed to do so at every turn. Counsel knew that Mullens’s mother had regularly abused drugs and alcohol while she was pregnant with him, yet they did not investigate the possibility of fetal alcohol spectrum disorder. Counsel knew that Mullens likely suffered from intellectual disability and organic brain injury—due to both fetal alcohol spectrum disorder and repeated head trauma—yet they failed to order neuropsychological testing to confirm it. Counsel knew that Mullens had been repeatedly sexually abused and raped, yet they failed to substantiate that fact with

available evidence. And counsel knew that Mullens exhibited all of the tell-tale signs of PTSD, yet they failed to investigate further or put on any evidence of PTSD at Mullens's sentencing.

Armed only with a woefully incomplete picture of Mullens's tragic history of abuse and mental health problems, trial counsel then failed to construct even a minimal explanation of Mullens's mental state at the time of the crime. Counsel knew that only six days before the crime, Mullens's stepfather, who had sexually abused and raped him for years, died suddenly, and that Mullens's mother had insisted that Mullens attend his abuser's funeral. Counsel knew that Mullens committed the crime *the day before* his abuser's funeral while under extreme mental and emotional stress, compounded by heavy drug and alcohol use. Yet counsel failed to present this narrative at sentencing, much less connect the mitigating evidence to Mullens's mental state at the time of the crime. This left the sentencing court to speculate about the relevance of Mullens's background and history of mental health problems. And it rendered the paltry evidence counsel did present disjointed, unpersuasive, and ineffective.

Beyond those failings, counsel also engaged only one expert witness, Dr. Machlus, when prevailing norms in capital litigation dictate a team approach including psychiatrists and neuropsychologists. And Dr. Machlus was utterly unfit for the task. He had never worked on a capital case before—a fact that was evident

at every stage. He failed to identify Mullens’s organic brain damage, failed to administer psychological tests according to professional standards, made errors in scoring tests, repeatedly relied on psychological diagnoses without first ruling out medical causes (such as brain damage), repeatedly administered prejudicial personality tests, failed to diagnose fetal alcohol spectrum disorder, and failed to diagnose PTSD due to repeated childhood physical and sexual abuse. Counsel compounded these errors by failing to correct obvious mistakes in Dr. Machlus’s work, such as his false assertion that Mullens had no history of head injury and his failure to recognize obvious signs of PTSD.

Not one of counsel’s numerous failures can be ascribed to trial strategy. As trial counsel testified—four times—the only explanation for each of these missteps was that counsel “did a bad job.” PCR/1654; PCR/1687; PCR/1698. These errors—both individually and collectively—contributed to a performance that fell well below prevailing professional norms under this Court’s precedents. The trial court therefore correctly determined that counsel’s conduct was deficient.

**1. Legal Standard: Counsel has an “obligation to conduct a thorough investigation of the defendant’s background.”**

Under the familiar standard set out in *Strickland v. Washington*, trial counsel’s performance is deficient if it falls below “an objective standard of reasonableness” based on “prevailing professional norms.” 466 U.S. 668, 688 (1984). “It is unquestioned that under prevailing professional norms at the time of [Mullens’s

sentencing], counsel had an ‘obligation to conduct a thorough investigation of the defendant’s background’” for the purpose of uncovering mitigation evidence for the sentencing phase. *Andrus v. Texas*, 140 S. Ct. at 1881 (quoting *Porter v. McCollum*, 558 U.S. 30, 39 (2009) (per curiam)); accord *Williams v. Taylor*, 529 U.S. 362, 396–97 (2000) (same); *State v. Reichmann*, 777 So. 2d 342, 350–51 (Fla. 2000) (same). “[T]he obligation to investigate and prepare for the penalty portion of a capital case cannot be overstated—this is an integral part of a capital case.” *State v. Lewis*, 838 So. 2d 1102, 1113 (Fla. 2002).

This Court has held that mental health problems in particular are an especially powerful form of mitigating evidence and that counsel’s failure to investigate the *possibility* of mental health problems amounts to deficient performance. “Where available information indicates that the defendant could have mental health problems, such an evaluation is fundamental in defending against the death penalty.” *Hurst v. State*, 18 So. 3d 975, 1010 (Fla. 2009) (internal quotation marks omitted) (quoting *Jones v. State*, 998 So. 2d 573, 583 (Fla. 2008)).

It is not enough—especially in a capital case—for counsel merely to conduct *some* investigation. In a case where the ultimate punishment may be imposed, counsel’s investigation must be “*thorough*.” *Andrus*, 140 S. Ct. at 1881 (emphasis added). Mitigating evidence is a cornerstone of our jurisprudence on crime and punishment. “If the sentencer is to make an individualized assessment of the

appropriateness of the death penalty, ‘evidence about the defendant’s background and character is relevant because of the belief, long held by this society, that defendants who commit criminal acts that are attributable to a disadvantaged background, or to emotional and mental problems, may be less culpable than defendants who have no such excuse.’” *Penry v. Lynaugh*, 492 U.S. 302, 319 (1989) (quoting *California v. Brown*, 479 U.S. 538, 545 (1987) (O’Connor, J., concurring)), *abrogated on other grounds by Atkins v. Virginia*, 536 U.S. 304 (2002). Counsel has a duty to “discover *all reasonably available* mitigating evidence and evidence to rebut any aggravating evidence that may be introduced by the prosecutor.” *Wiggins v. Smith*, 539 U.S. 510, 524 (2003) (internal quotation marks and citation omitted).

In certain circumstances, it may be a reasonable trial strategy for counsel to focus on certain elements, defenses, or evidence at the expense of others, and to abandon lines of inquiry that counsel reasonably believes would be fruitless. But counsel cannot abandon a line of inquiry without first conducting a sufficient preliminary investigation to reasonably conclude that further inquiry would be futile. *Wiggins*, 539 U.S. at 527–28. The U.S. Supreme Court has repeatedly held that counsel may not simply “abandon[] their investigation of [their client’s] background after having acquired only rudimentary knowledge of [the client’s] history from a narrow set of sources.” *Id.* at 524; *see Williams*, 529 U.S. at 396; *Rompilla v. Beard*, 545 U.S. 374, 390–93 (2005). Nor may counsel “ignore[] pertinent avenues for

investigation of which he should have been aware.” *Andrus*, 140 S. Ct. at 1882 (quoting *Porter*, 558 U.S. at 40).

The duty to engage in a thorough investigation goes to the heart of counsel’s responsibilities as an adviser and advocate: “[c]ounsel cannot responsibly advise a client about the merits of different courses of action, the client cannot make informed decisions, and counsel cannot be sure of the client’s competency to make such decisions, unless counsel has first conducted a thorough investigation.” American Bar Association, *Guidelines for the Appointment and Performance of Counsel in Death Penalty Cases* (rev. ed. 2003), Guideline 10.7 cmt., in 31 Hofstra L. Rev. 913, 1021 (2003) (hereinafter “ABA Guidelines”), available at [https://www.americanbar.org/content/dam/aba/administrative/death\\_penalty\\_representation/2003guidelines.pdf](https://www.americanbar.org/content/dam/aba/administrative/death_penalty_representation/2003guidelines.pdf).

The need for thorough investigation of all potential lines of inquiry on mitigation is especially acute where counsel’s stated strategy is to concede guilt to focus on presenting a compelling case at sentencing. Where counsel chooses to pursue a mitigation strategy, the U.S. Supreme Court has repeatedly held that “[c]ounsel’s failure to uncover and present ... [existing] voluminous mitigating evidence’ ... cannot ‘be justified as a tactical decision.’” *Andrus*, 140 S. Ct. at 1883 (quoting *Wiggins*, 539 U.S. at 522). Rather, counsel has a duty to “discover *all*

*reasonably available* mitigating evidence.” *Wiggins*, 539 U.S. at 524. Failure to do so is deficient performance.

**2. Trial counsel failed to investigate and present evidence of fetal alcohol spectrum disorder, intellectual disability and organic brain damage, sexual abuse, and PTSD.**

**a. Trial counsel failed to investigate and present evidence that Mullens suffers from fetal alcohol spectrum disorder.**

Trial counsel were aware that Mullens’s mother drank while pregnant and that Mullens displayed the classic symptoms of fetal alcohol spectrum disorder (FASD), a devastating and permanent brain condition caused by exposure to alcohol *in utero*. Yet trial counsel failed to investigate or present any evidence of fetal alcohol spectrum disorder at sentencing. This Court has held, in remarkably similar circumstances, that counsel’s failure to investigate evidence of brain damage caused by fetal alcohol syndrome falls well below prevailing professional norms. *See Hurst v. State*, 18 So. 3d 975, 1011 (Fla. 2009). The postconviction court therefore correctly found that counsel’s failure to investigate evidence that Mullens suffers from fetal alcohol spectrum disorder was deficient performance.

**i.** Trial counsel uncovered ample evidence that should have prompted further investigation into the effects of fetal alcohol consumption on Mullens’s behavior as an adult and his culpability for the underlying offenses. Mullens’s mother, Cassandra Washington, told two members of the defense team (Menadier

and Miller) that she drank regularly when she was pregnant with Mullens. PCR/1471; PCR/1686–87. Further investigation would have revealed that Mullens’s mother did not receive any prenatal care whatsoever, or even take prenatal vitamins. PCR/2073–74. Instead, she played card games while drinking Bacardi and Olde English on a daily basis. PCR/2075. Mullens’s mother also regularly used marijuana and cocaine while she was pregnant with him. PCR/2071.

Consuming alcohol while pregnant causes fetal alcohol spectrum disorder, a permanent and incurable brain condition caused by alcohol’s adverse effects on fetal brain development. PCR/1871; PCR/1923; PCR/2109–11. Fetal alcohol spectrum disorder diminishes development of the frontal lobe (the brain structure that is associated with understanding cause and effect and the consequences of one’s actions, interpreting information, and controlling urges, PCR/2125–26) and the corpus callosum (the brain structure that is responsible for communicating information throughout the brain for interpretation and processing, PCR/1914–16), PCR/2115–17, and it is the single most common nongenetic cause of intellectual disability, PCR/2297. The disorder is associated with numerous, permanent adverse health outcomes, including low IQ, mood disorders, substance abuse, a lifelong pattern of impulsive and aberrant behavior, learning disabilities, and attention deficit hyperactivity disorder. PCR/2118–19.

Mullens’s lead trial counsel were aware of the health effects of fetal alcohol spectrum disorder and its common use as a mitigating factor in sentencing proceedings. PCR/1723–24; PCR/1779–80. Menadier testified that “fetal alcohol is always a concern” when developing mitigation evidence. Op. 17–18 (PCR/2937–38). Miller specifically recognized that Mullens potentially suffered from fetal alcohol spectrum disorder and raised the issue with the rest of the defense team. PCR/1686–87. Yet, despite all of the warning signs, no one on Mullens’s defense team followed up because, as counsel later admitted, they “did a bad job.” PCR/1686. Due to counsel’s failure to investigate further, an issue that should have been obvious to any competent capital defense lawyer within five minutes of meeting Mullens was not presented at sentencing: “[T]here was no testimony or evidence presented during the penalty phase that Cassandra drank during her pregnancy with Mr. Mullens. There was no presentation or even suggestion of fetal alcohol syndrome or spectrum disorder during the penalty phase.” Op. 17 (PCR/2937).

On postconviction review, the court received competent, substantial testimony and other evidence that Mullens suffers from fetal alcohol spectrum disorder, which the court found “to be *credible and compelling* to a mitigation presentation.” Op. 23 (PCR/2943) (emphasis added). The court heard from both Miller and Menadier that Mullens’s mother admitted to drinking regularly while

pregnant with him. PCR/1471; PCR/1686–87; *see* Op. 17 (PCR/2937) (“Menadier testified that she had personal knowledge that Cassandra drank alcohol during her pregnancy [with] Mr. Mullens from Cassandra herself, Mr. Mullens’ older siblings, and Mr. Mullens’ father.”).<sup>10</sup> And Mullens’s father testified that he had personally witnessed Mullens’s mother drink and use illegal drugs while pregnant with Mullens. PCR/2071; PCR/2075. The court also heard expert testimony that Mullens exhibited neuropsychiatric conditions consistent with fetal alcohol spectrum disorder. Op. 18–19 (PCR/2938–39). And Dr. Maher testified that Mullens’s mother’s alcohol and drug use “had an undeniable, clear and relentless influence on his brain development during gestation.” PCR/2108. The postconviction court thus concluded that, “given the well-known fact of the mother’s heavy drinking during Mr. Mullens’ youth and the psychiatric conditions Mr. Mullens[] exhibited, the Court believes that this should have suggested to counsel, the mitigation specialist [Cunningham], and Dr. Machlus to explore the possibility of the mother’s drinking during pregnancy and the effects on Mr. Mullens resulting from his mother’s consumption of alcohol while pregnant.” Op. 18 (PCR/2938).

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<sup>10</sup> The postconviction court seems to have overlooked Miller’s testimony, PCR/1686–87, when it stated, “it is unclear who had knowledge of Cassandra’s drinking while pregnant other than Attorney Menadier.” Op. 18 (PCR/2938).

ii. The information counsel had available at sentencing was more than sufficient to put them on notice that they should investigate whether Mullens suffers from fetal alcohol spectrum disorder. Their failure to do so was deficient performance under this Court's precedent.

Mullens's case presents facts that are strikingly similar to those in *Hurst*, 18 So. 3d 975, which the State does not even cite, much less attempt to distinguish. As in *Hurst*, Mullens's counsel "kn[e]w that [his] mother drank heavily during her pregnancy." *Id.* at 1011. As in *Hurst*, Mullens's counsel should have surmised that Mullens "might have suffered from fetal alcohol syndrome because of his mother's alcohol abuse" during his infancy and childhood. *Ibid.* As in *Hurst*, "[r]easonable investigation ... would have turned up evidence ... indicating that [Mullens] probably had organic brain damage resulting from fetal alcohol syndrome." *Ibid.* As in *Hurst*, "[a]t a minimum, the information possessed by trial counsel provided a reasonable basis to request an examination of [Mullens] to explore the question of fetal alcohol syndrome." *Ibid.* Under *Hurst*, Mullens's counsel's conduct was clearly deficient.

Likewise, in *Wiggins*, there was evidence of Wiggins's alcoholic mother and his problems in foster care, yet counsel failed to follow up on these leads and look for potentially mitigating evidence. 539 U.S. at 525. The U.S. Supreme Court concluded that "any reasonably competent attorney would have realized that

pursuing these leads was necessary to making an informed choice among possible defenses.” *Ibid.* Other federal courts recognize that counsel’s failure to investigate signs of fetal alcohol syndrome falls well below prevailing professional norms. *See, e.g., Williams v. Stirling*, 914 F.3d 302, 314 (4th Cir.), *as amended* (Feb. 5, 2019) (“[Counsel’s] failure to further investigate signs of FAS [fetal alcohol syndrome] fell below the then-current standard for mitigation investigations: both attorneys acknowledged they were aware of the mitigating value of neurological defects at the time of Williams’ sentencing ... yet they failed to investigate this issue.”).

Mullens’s counsel were also deficient under the ABA Guidelines, which this Court recognizes as describing the prevailing professional norms that counsel must follow.<sup>11</sup> “The ABA Guidelines provide that investigations into mitigating evidence ‘should comprise efforts to discover all reasonably available mitigating evidence and evidence to rebut any aggravating evidence that may be introduced by the prosecutor.’” *Parker v. State*, 3 So. 3d 974, 984–85 (Fla. 2009) (quoting ABA Guideline 11.4.1(C), at 93 (1989 ed.)). The current edition of the ABA Guidelines (adopted eight years before Mullens’s sentencing) states that “[c]ounsel needs to explore” a defendant’s “[m]edical history (including ... mental and physical illness

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<sup>11</sup> The U.S. Supreme Court has likewise described the ABA Guidelines as articulating “well-defined norms” for the performance of capital defense teams at sentencing. *Wiggins*, 539 U.S. at 524; *see also Williams*, 529 U.S. at 396 (similar).

or injury, ... pre-natal and birth trauma, ... developmental delays, and neurological damage).” ABA Guideline 10.7 cmt., *in* 31 Hofstra L. Rev. at 1022. The Guidelines also specifically note that evidence of “fetal alcohol syndrome ... could be of critical importance,” and that such evidence may require expert analysis to be uncovered and developed. *See* ABA Guideline 4.1 cmt., *in* 31 Hofstra L. Rev. at 956–57. The State does not dispute that counsel failed to undertake these critically important investigations.

**iii.** The State does not contest that Mullens suffers from fetal alcohol spectrum disorder or that his FASD diagnosis is supported by “competent, substantial evidence.” *Porter*, 788 So. 2d at 923. Nor does the State contest that fetal alcohol spectrum disorder is a substantial mitigating fact that “should have been further explored and developed” by trial counsel. Op. 18 (PCR/2938). Indeed, the State affirmatively argues (at 88) that trial counsel were aware of the “fact[s] and circumstance[s]” that formed the basis of Mullens’s postconviction FASD diagnosis yet did nothing. Any contrary argument the State might attempt to raise for the first time in its reply would be waived. *See Hoskins v. State*, 75 So. 3d 250, 257 (Fla. 2011).

Effectively conceding that counsel failed to undertake necessary investigations, the State instead attempts to justify counsel’s failures with *post hoc* speculation. The State speculates that Mullens’s mother *might* have denied drinking

while pregnant *if* she had been called to testify, and from that the State asserts that “counsel cannot be faulted for failing to put on evidence of alleged fetal alcohol consumption when the persons most likely to know whether that was true either would not admit it or would contradict it.” State Br. 84. That is baseless speculation, and it completely misses the point. For one, it ignores the fact that Mullens’s mother told *two* members of his defense team that she drank while pregnant. PCR/1471; PCR/1686–87. The State produced no evidence that these admissions were false or that Mullens’s mother would recant them—speculating only now that she might not have been willing to “fall on her sword.” State Br. 84. But the State’s assertion is belied by the record: Cassandra Washington *did* “fall on her sword” at Mullens’s sentencing, admitting on the stand that she drank heavily and used drugs while Mullens was a young child, R7/1105–06; counsel simply failed to inquire whether she drank and used drugs *while pregnant*.<sup>12</sup> And even if Mullens’s mother would have suddenly denied (or refused to testify) that she drank while pregnant, the State acknowledges that other relatives saw her do it and could have testified to that effect. State Br. 83; *see* Op. 17 (PCR/2937–38). Beyond that, this Court has previously rejected the State’s argument that counsel’s deficient performance can be excused by a defendant’s or his family’s refusal to cooperate with counsel. *See State v. Lara*,

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<sup>12</sup> Cassandra Washington died before Mullens’s evidentiary hearing on postconviction review and was thus unable to testify.

581 So. 2d 1288, 1290 (Fla. 1991) (“reject[ing] the state’s argument” that “it was [the defendant] and his family who prevented counsel from developing and presenting the [mitigating] evidence at trial”).

But that’s all beside the point. Trial counsel were not deficient merely for failing to call Mullens’s mother to testify about drinking while pregnant; they were deficient for failing even to *investigate* whether—and to present *any* evidence that—Mullens suffers from fetal alcohol spectrum disorder. *See Wiggins*, 539 U.S. at 523 (“[The] principal concern ... is not whether counsel should have presented a mitigation case. Rather, [the] focus [should be] on whether the investigation supporting counsel’s decision to not introduce mitigating evidence ... *was itself reasonable*.”). Even without any testimony from Mullens’s mother, competent counsel would have engaged an expert to investigate whether Mullens suffers from fetal alcohol spectrum disorder. That is precisely what happened on postconviction review.

The State also asserts (at 84–85) that “the supposed ‘effects’ of fetal alcohol consumption are consistent with Mullens’s long-standing diagnosis of Bipolar Disorder, Antisocial Personality Disorder, and Intermittent Explosive Disorder”—seeming to suggest, without further explanation (or record citations), that Mullens’s FASD diagnosis is somehow superfluous to his mitigation defense. To begin, it is disturbing that the State would use “scare quotes” (twice) to call into question the

effects of fetal alcohol consumption. Those “‘effects’” are not “supposed,” *contra* State Br. 84–85; they are extensively documented and universally accepted as fact. *See* PCR/2110–11 (explaining that FASD is listed in the ICD, a widely accepted medical diagnostic manual).<sup>13</sup> And even if the State intended to insinuate (unartfully) only that *Mullens* does not actually suffer from fetal alcohol spectrum disorder, that insinuation is belied by the record—which the State *does not dispute*, much less argue that the district court’s findings were not based on competent, substantial evidence.

Scare quotes aside, the State’s assertion that Mullens’s FASD diagnosis is “consistent with” Mullens’s other diagnoses is, at best, irrelevant. Yes, a person can suffer from fetal alcohol spectrum disorder alongside bipolar disorder, antisocial personality disorder, and intermittent explosive disorder. Those four diagnoses are not inconsistent. But that does not mean—as the State seems to suggest without evidence—that fetal alcohol spectrum disorder does not have its own, independent pathologies and behavioral effects that are highly relevant to culpability and mitigation. Unlike Mullens’s other disorders, fetal alcohol spectrum disorder

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<sup>13</sup> Indeed, the Florida Department of Health recognizes the devastating harms caused by fetal alcohol exposure and has devoted substantial resources to preventing and treating fetal alcohol spectrum disorder. *See, e.g.,* Fla. Dep’t of Health, *Florida Department of Health Acknowledges International Fetal Alcohol Spectrum Disorder Awareness Day* (Sept. 8, 2014), <http://www.floridahealth.gov/newsroom/2014/09/090814-fasd-day.html>.

diminishes development of the frontal lobe and the corpus callosum, PCR/2115–17, causing “permanent abnormal brain development,” Op. 18 (PCR/2938). Unlike Mullens’s other disorders, fetal alcohol spectrum disorder is the single most common nongenetic cause of intellectual disability. PCR/2297. And, unlike Mullens’s other disorders, fetal alcohol spectrum disorder has a known and directly traceable cause: Mullens’s mother’s decision to drink while pregnant. In other words, evidence of fetal alcohol spectrum disorder not only reduces Mullens’s culpability, it provides support for his diagnosis of intellectual disability and organic brain damage.

Finally, the State argues that Mullens’s FASD “‘diagnos[i]s’” (again with the baseless scare quotes) is “not based on any fact or circumstance that defense counsel failed to uncover” but on “a difference of expert opinions.” State Br. 88. That is as wrong as it is misleading. To begin, the *only* expert to testify about fetal alcohol spectrum disorder—whether at sentencing or on postconviction review—was Dr. Maher, who diagnosed Mullens with FASD. The State did not put on any evidence—whether at sentencing or on postconviction review—that Mullens does not have FASD. In other words, there is no “difference of expert opinions,” neither between Mullens’s trial and postconviction experts nor between Mullens’s and the State’s experts.<sup>14</sup> Beyond that, trial counsel *were* aware of the fact that Mullens’s mother

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<sup>14</sup> Any argument that the State’s expert, Dr. Holder, disputed Mullens’s FASD diagnosis would be wrong. Dr. Holder concluded, based on his analysis of Mullens’s

regularly drank while pregnant (which should have caused them to investigate the possibility of fetal alcohol spectrum disorder), but it was not until postconviction review Dr. Maher actually examined Mullens for fetal alcohol spectrum disorder, found physiological and psychological proof that he suffers from fetal alcohol spectrum disorder, and made his FASD diagnosis. No one—not trial counsel, not Cunningham, not Dr. Machlus—had previously uncovered or considered that evidence, much less made (or ruled out) an FASD diagnosis. Indeed, no one investigated the possibility of fetal alcohol spectrum disorder *at all*. That is precisely what made counsel’s performance deficient.

At bottom, the State’s arguments are simply nonresponsive and *non sequitur*. What matters is that the State (1) does not contest that Mullens suffers from fetal alcohol spectrum disorder; (2) does not contest that the postconviction court’s findings were based on competent, substantial evidence; (3) does not contest that Mullens’s defense team should have known he suffered from fetal alcohol spectrum disorder; and (4) does not contest that, based on what they knew, trial counsel should

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brain scans, that Mullens does not have a shrunken corpus callosum (which would be consistent with FASD). But a shrunken corpus callosum is not the only evidence that Mullens suffers from FASD, and Dr. Holder did not otherwise examine Mullens or render an FASD diagnosis. Moreover, even if Dr. Holder had concluded that Mullens does not suffer from FASD, the postconviction court was right to credit Dr. Maher’s FASD diagnosis, which is supported by competent, substantial evidence—a fact that the State does not dispute.

have investigated further but did nothing. Under this Court's precedent and undisputed prevailing professional norms, counsel's conduct was deficient.

**b. Trial counsel failed to investigate and present evidence that Mullens suffers from organic brain damage and intellectual disability.**

Trial counsel all recognized that Mullens exhibited signs of brain damage and intellectual disability. And multiple members of the defense team, from Cunningham to Dr. Gamache, told counsel that Mullens might have brain damage. From that, counsel was on notice to investigate further. Yet counsel failed to have a neuropsychologist examine Mullens and wrongly believed that the psychologist they did hire was qualified to make a neuropsychological diagnosis (he wasn't). This Court has recognized time and again that mental-state mitigation—especially evidence of intellectual disability and brain damage—are the most weighty forms of mitigating evidence. As such, counsel's failure to adequately investigate Mullens's intellectual disability and brain damage, despite all the indications and warnings from members of the defense team, undeniably amounts to deficient performance.

i. *Everyone* on Mullens's defense team recognized that Mullens suffered from a serious intellectual disability and possible brain damage. Even Clapp—withstanding his alcoholism and negligence—immediately knew that something wasn't right with Mullens “just interacting with him.” PCR/2739–40. In 2008, when the case came into the office, Clapp engaged neuropsychologist Dr. Michael

Gamache because he suspected something was “definitely wrong” with Mullens’s brain (and because Clapp wanted to disqualify Dr. Gamache from being called as a witness by the State). PCR/2740; PCR/2747; PCR/4025–26. Apparently, the trial team did nothing to utilize Dr. Gamache for mitigation or diagnosis until *three years later*, in October 2011 (about 18 months before Mullens pleaded guilty), when Dr. Gamache first examined Mullens and told Menadier that Mullens may suffer from damage to his frontal lobe. PCR/3050. At the postconviction hearing, Menadier confessed she had no recollection of this conversation with Dr. Gamache, and that no one ever followed up or ordered more testing. PCR/1464–65. Dr. Gamache did no further work on the case.

Dr. Machlus was eventually hired after Clapp was fired—only eight weeks before Mullens’s sentencing. PCR/1743. But Dr. Machlus is a psychologist, not a neuropsychologist, like Dr. Gamache. As Dr. Ouaou (a neuropsychologist) testified at the postconviction hearing, neuropsychology is a specialty within the field of clinical psychology that focuses on brain function and its effects on behavior. PCR/2231–32; *see* Am. Psych. Ass’n, *Clinical Neuropsychology* (2008), <https://www.apa.org/ed/graduate/specialize/neuropsychology> (“Clinical Neuropsychology is a specialty field within clinical psychology, dedicated to understanding the relationships between brain and behavior, particularly as these relationships can be applied to the diagnosis of brain disorder, assessment of cognitive and behavioral

functioning and the design of effective treatment.”); Nat’l Acad. of Neuropsychology, *NAN Definition of a Clinical Neuropsychologist* (2001), <https://www.nanonline.org/docs/PAIC/PDFs/NANPositionDefNeuro.pdf> (“The clinical neuropsychologist uses psychological, neurological, cognitive, behavioral, and physiological principles, techniques and tests to evaluate patients’ neurocognitive, behavioral, and emotional strengths and weaknesses and their relationship to normal and abnormal central nervous system functioning.”). Neuropsychologists are trained to administer tests and diagnose medical conditions, including organic brain damage, that psychologists, like Dr. Machlus, are not. *Ibid.* As such, Dr. Machlus did not have the training, experience, or formal qualifications to test for—much less diagnose—Mullens’s neuropsychological problems.

Notwithstanding the lack of testing, Mullens’s disability was plain for anyone to see. He showed *countless* signs that should have prompted experienced trial counsel like Menadier and Hays to engage a neuropsychologist and to investigate organic brain damage: serial head injuries, sensory-processing problems, school failures, fetal exposure to alcohol and drugs, using drugs and huffing aerosols as a child and teenager, peripheral vision issues, hallucinations, low IQ, memory problems, odd gait, strange and compulsive behavior, disinhibition, inappropriate jocularity, and rapid, pressured speech. *See, e.g.*, PCR/1367–68; PCR/1380–81; PCR/1396–97; PCR/1806; PCR/2265–66; PCR/2279–80; PCR/2993; PCR/3026;

PCR/3033; PCR/3122–23. As Eide put it: “[H]e was not right. ... [Mullens] obviously had some type of mental impairment ... organicity [organic brain damage] or some other type of mental illness or a combination of the two. ... I know he was a substance abuser. That can’t be good for what little brain cells he possessed.” PCR/1751. When asked to clarify what he meant by “organicity,” he explained that he believed Mullens had “organic brain damage.” *Ibid.* “Dead areas of the brain that aren’t functioning right.” *Ibid.*

Because Cunningham was overwhelmingly concerned that Mullens had not been properly diagnosed, Cunningham recommended that Dr. Machlus speak with a neuropsychologist and specifically recommended Dr. Ouaou, who testified on Mullens’s behalf at the postconviction hearing. PCR/1391; PCR/3036. Cunningham’s recommendation was not followed. And “after it seemed [to Cunningham] like Dr. Machlus was not understanding Mr. Mullens’ case well, she suggested to counsel to use a different expert or get a second opinion.” Op. 20 (PCR/2940). Again, Cunningham’s recommendation was ignored.

The two lead death-qualified trial attorneys on Mullens’s case wrongly believed that Dr. Machlus was qualified to conduct neuropsychological testing. PCR/1499–1500; PCR/1798. Despite the fact that Menadier had consulted with neuropsychologists and used brain imaging in past cases, and the fact that Dr. Gamache told Menadier he suspected Mullens suffered from frontal lobe

dysfunction, Menadier admitted at the evidentiary hearing that she thought Dr. Machlus had administered neurological testing to Mullens. PCR/1499–1500. He had not. Menadier later admitted, “going through this process and my file, there’s a lot of things I missed and didn’t follow-up on them like I should have.” PCR/1501. Menadier explained that she understood that a history of head injuries indicates a need for a neuropsychiatric work-up and that it had been a “mistake” to not get one. PCR/1473; PCR/1504–05; *see* Op. 20 (PCR/2940). Hays, likewise, could not explain why no one followed up about getting brain scans such as a PET scan or MRI, noting, “I don’t know that there was any reason not to.” PCR/1806.

Miller, the most junior member of Mullens’s defense team, didn’t know the difference between a psychologist and a neuropsychologist at the time she worked on Mullens’s defense. PCR/1673. Compounding that confusion, Menadier had incorrectly told Miller that Dr. Machlus *was* a neuropsychologist. PCR/1683. Menadier, of course, should have known better, considering that the word “neuropsychologist” is absent from Dr. Machlus’s curriculum vitae and his report, which also makes no mention whatsoever of neurological testing or other examinations typically carried out by a neuropsychologist. R13/2153–92. In Miller’s view, there was simply no reason—strategic or otherwise—not to follow Cunningham’s recommendation that a neuropsychologist should examine Mullens. PCR/1677. It seems the only reason counsel didn’t follow Cunningham’s

recommendation is that they wrongly believed that Dr. Machlus had already administered neuropsychological testing.

Trial counsel admitted that they knew that brain damage is one of the most important mitigation factors considered by Florida courts. PCR/1799. And counsel had ample funding for experts in capital cases, so there were no financial constraints on assembling resources for Mullens's defense. PCR/1456. Yet counsel failed to recognize the signs of intellectual disability and organic brain damage, and they failed to engage a neuropsychologist or anyone else who could properly diagnose those conditions. As a result, the sentencing court was not presented with key evidence of Mullens's intellectual disability and organic brain damage. "There was simply no presentation as to Mr. Mullens' adaptive deficits during the penalty phase, let alone whether they occurred prior to the age of 18." Op. 12 (PCR/2932). And the "evidence as to the effects of brain damage from repeated trauma" and fetal exposure to alcohol and drugs was likewise "overlooked at the penalty phase." Op. 23 (PCR/2943). Trial counsel admitted there was "no reason" she failed to investigate and present mitigation evidence of head injury and brain damage. PCR/1677.

On postconviction review, the court heard, for the first time, competent, substantial, and *unrebutted* evidence that Mullens suffers from intellectual disability and organic brain damage. Neuropsychologist Dr. Robert Ouaou testified that he spent ten or eleven hours with Mullens over three visits to administer a battery of

specialized tests to assess brain function. PCR/2252–53. He administered numerous tests of memory, logic, perception, executive function, and intelligence, as well as several embedded and stand-alone measures to evaluate whether Mullens was malingering. PCR/2255–60; PCR/3314–21; PCR/3479–85. Mullens passed every test for malingering and gave full effort on all of his testing. PCR/2270; PCR/2361 (no problems with Mullens’s symptom validity for brain damage or intellectual disability). But Mullens demonstrated significant impairments in executive function, learning, memory, and language functioning. PCR/2271. Mullens was found to have severely impaired executive function, scoring in the first or second percentile. PCR/2273–74. His learning and memory scores on the California Verbal Learning Test and the Weschler Memory Scale fell below the first percentile. PCR/2276; PCR/3479–85. This pattern of test results indicates organic brain damage in the frontal limbic system and frontal lobe—which is highly relevant to mitigation—because these parts of the brain controls judgement, rationality, social comportment, following rules, reasoning through feelings, and impulse control. PCR/2288–89.

The State did not proffer a neuropsychologist or offer any evidence whatsoever to counter Dr. Ouaou’s conclusions relating to the brain damage he had diagnosed Mullens with through neuropsychological testing.<sup>15</sup> And the

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<sup>15</sup> Mullens also presented brain-scan evidence and expert testimony by Dr. Wu to corroborate his diagnosis, and the State proffered its own rebuttal expert, Dr. Holder,

postconviction court found “the testimony and evidence as to the effects of brain damage from repeated trauma, ... and the testimony and evidence regarding Mr. Mullens’ possible intellectual disability to be *credible and compelling* to a mitigation presentation[,] and[] all were overlooked at the penalty phase.” Op. 23 (PCR/2943) (emphasis added).

ii. Counsel was on notice that Mullens presented numerous warning signs of organic brain damage and intellectual disability. Counsel’s failure to investigate those potential disorders (and their failure to hire qualified experts to examine Mullens for those disorders) was clear deficient performance under this Court’s precedent.

This Court has consistently recognized that “mental mitigation that establishes statutory and nonstatutory mitigation can be considered to be a weighty mitigator.” *Hurst*, 18 So. 3d at 1014. In particular, this Court has held that “borderline intelligence, impaired intellectual functioning, [and] possible organic brain damage” are “*all considered strong mitigators.*” *Ibid.* (emphasis added). And the Court has consistently held that failure to investigate evidence of organic brain damage and

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who disagreed with Dr. Wu’s conclusions. The postconviction court, however, found Mullens’s and the State’s brain-scan evidence to be “conflicting” and therefore “not dispositive.” Op. 16 (PCR/2936). But Dr. Holder, notably, conceded that he would “defer to the findings of a qualified neuropsychologist” arising out of “neuropsychological testing.” PCR/2679.

other mitigation evidence amounts to deficient performance. *See, e.g., id.* at 1014–15 (failure to consider “borderline intelligence, impaired intellectual functioning, possible organic brain damage,” *inter alia*); *Rose v. State*, 675 So. 2d 567, 573 (Fla. 1996) (failure to investigate organic brain damage and personality disorder, *inter alia*); *Phillips v. State*, 608 So. 2d 778, 783 (Fla. 1992) (failure to present evidence of “borderline intelligence,” *inter alia*); *Mitchell v. State*, 595 So. 2d 938, 942 (Fla. 1992) (failure to present evidence of organic brain damage, drug and alcohol abuse, and child abuse); *Lara*, 581 So. 2d at 1289 (failure to present evidence of diminished mental capacity, *inter alia*). Likewise, in *Rompilla v. Beard*, the U.S. Supreme Court found trial counsel ineffective for not discovering and introducing evidence that Rompilla “suffer[ed] from organic brain damage, an extreme mental disturbance significantly impairing several of his cognitive functions,” which affected his “capacity to appreciate the criminality of his conduct or to conform his conduct to the law.” 545 U.S. 374, 392 (2005).

**iii.** The State attempts to cast Mullens’s brain damage and intellectual disability as “a difference of opinion ... among pretrial and postconviction experts.” State Br. 68. It is not. Begin with the evidence of Mullens’s brain damage. The State does not dispute that *nobody* examined Mullens for brain damage before sentencing. The only qualified expert to even consider the possibility, Dr. Gamache, specifically told counsel that Mullens might have frontal lobe damage—a fact that counsel

admitted was sufficient to trigger her duty to investigate further. PCR/1464–65. There was simply no conflicting expert testimony below because there was no investigation, much less any diagnosis one way or the other.

As for Mullens’s intellectual disability, the State is wrong to rely on Dr. Machlus’s faulty administration of the WAIS-IV, which Dr. Machlus admitted he had administered in multiple sessions over multiple days, contrary to the test’s instructions. R10/1429–30. Intelligence testing is a precise science in which an individual’s capabilities are compared to broad norms across the population. PCR/2330–32; PCR/2337; PCR Evidentiary Hearing, Defendant’s Ex. 33 (WAIS-IV Manual) (admitted under seal below because the WAIS-IV is proprietary). In order to get valid results, mental health professionals use standardized testing methods, so that comparisons between individuals and the norms are not the result of random, varied testing procedures. *Ibid.* The WAIS-IV’s manual stresses the importance of maintaining standardized test administration. *Ibid.* The manual clearly states that test administrators “should make every effort to administer the core and supplemental subtests ... *in one session.*” WAIS-IV Manual at 28 (emphasis added). Under rare circumstances, the subtests can be administered in *two* sessions, but “[i]f administration ... must be done in two sessions, the second session should occur *as soon as possible.*” *Ibid.* (emphasis added). There is no provision in the WAIS-IV

manual for breaking up the IQ subtests into *multiple sessions* over *multiple days*.  
*Ibid.*

Breaking up IQ testing by many days produced an invalid, artificially inflated IQ score. PCR/2337. The WAIS-IV is intended to be given in a single one-hour session, yet Dr. Machlus gave the test on dates that were at least a week apart. PCR/2331. As Dr. Ouaou explained, that is like a hockey game in which one team gets line changes and the other does not. PCR/2332. The fatigue factor had an especially strong effect on Mullens's WAIS-IV scores involving processing speed. His processing-speed scores on Dr. Machlus's test were in the 50th percentile and the 16th percentile; his scores on Dr. Ouaou's were in the 9th percentile and the 5th percentile. PCR/2336. Since the WAIS-IV is normed to account for fatigue, Dr. Machlus's score is outside both medical and legal norms and cannot be used substantively to disprove intellectual disability. PCR/2330–32; PCR/2337; PCR Evidentiary Hearing, Defendant's Ex. 33 at 28 (WAIS-IV Manual).

The State counters (at 41) that “[n]owhere in the WAIS testing manual ... does it state that giving the test over multiple days invalidates the score.” That is pure semantics. The manual provides instructions on how to *properly* administer the test to achieve a valid result, and there is no dispute that Dr. Machlus failed to follow those instructions. Dr. Ouaou's testimony was not a difference of expert opinion on this matter; it was the first time the court ever heard *valid and reliable* testimony

regarding Mullens's IQ. *See* Fla. Admin. Code R. 65G-4.011 ("When a defendant convicted of a capital felony is suspected of having ... intellectual disability ... [t]he test shall consist of an individually administered evaluation, *which is valid and reliable* for the purpose of determining intelligence." (emphasis added)).

The State also argues (at 78–85) that Mullens failed to adduce competent and substantial evidence of brain damage and intellectual disability. Wrong again. As for brain damage, Mullens presented several different types of evidence proving intellectual disability at the postconviction hearing. First, he presented factual evidence identifying several potential causes of brain damage, namely, that Mullens's mother drank heavily while pregnant with him and that Mullens suffered serious and repeated head trauma as a child. Second, he presented expert testimony from Dr. Ouaou and Dr. Maher that Mullens's neurological testing strongly indicated organic brain damage. And third, he presented expert testimony from Dr. Wu, who testified that Mullens's brain scans showed "very significant" brain abnormalities consistent with fetal alcohol spectrum disorder, traumatic brain injury, and chronic traumatic encephalopathy (CTE). PCR/1840; PCR Evidentiary Hearing, Defendant's Exs. 21 & 22 (CD-ROMs containing image files of Mullens's PET and MRI scans); PCR/3401–78.

The State did not put on *any* evidence to rebut the first two evidentiary bases for finding brain damage. Instead, the State proffered the testimony of only one

expert, Dr. Holder, who testified that he disagreed with Dr. Wu’s conclusion that Mullens’s brain scans showed brain damage. The postconviction court found the experts’ testimony on this point to be “conflicting” and therefore “not dispositive.” Op. 16 (PCR/2936). But, notably, Dr. Holder conceded that he would “defer to the findings of a qualified neuropsychologist” about the results of “neuropsychological testing.” PCR/2679. And he did not dispute Dr. Ouaou’s neuropsychological diagnosis that Mullens suffers from organic brain damage. *See ibid.*

Even discounting the conflicting brain-scan evidence, the postconviction court still found that Mullens likely suffers from brain damage based on the neuropsychological evidence presented. Op. 23 (PCR/2943). As this Court has consistently held, when a postconviction court hears conflicting evidence at a postconviction evidentiary hearing, it is for the postconviction court, not this Court, to resolve the conflict by weighing the evidence. *See, e.g., Porter*, 788 So. 2d at 923. In Mullens’s case, the postconviction court held that the evidence weighed in favor of finding organic brain damage, and that decision was supported by two independent evidentiary bases.

As for Mullens’s intellectual disability, not only is the evidence competent and substantial; it went entirely un rebutted below.<sup>16</sup> Mullens put on evidence

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<sup>16</sup> As we argue below, the postconviction court should have granted Mullens’s stand-alone intellectual-disability claim. *See infra* Argument Section II.B. But it is

establishing that he has an IQ consistent with a diagnosis of intellectual disability. Op. 10–11 (PCR/2930–31). He put on evidence establishing that he has suffered from adaptive deficits. Op. 10–12 (PCR/2930–32). And he put on evidence establishing that he experienced the onset of these symptoms “during the development[al] period,” that is, before he turned 18. Op. 11, 24–25 (PCR/2931; PCR/2944–45).<sup>17</sup> That evidence satisfied all three prongs for finding intellectual disability under Florida law. *See* Fla. Stat. Ann. § 921.137(1).

The State put on no evidence rebutting these facts. Instead, the State attempted only to poke holes in Mullens’s evidence. But its arguments fail. With regard to Mullens’s IQ, the State failed to produce through its own expert an IQ score for Mullens high enough to discredit Mullens’s intellectual disability. Instead, the State asked the postconviction court to *ignore* Mullens’s one properly administered test, on which he scored a 73, *see* Op. 24 (PCR/2944), and to credit the botched test administered by Dr. Machlus. The postconviction court was obviously right to give greater weight to the properly administered test. The State asserts (at 71) without any basis: “If anything, there is competent substantial evidence to support a finding

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also independently true that trial counsel’s failure to adequately investigate and present evidence of intellectual disability amounts to deficient performance.

<sup>17</sup> This evidence is described in greater detail below. *See infra* Argument Section II.B.2.

that the pretrial score is accurate and the postconviction score is invalid.” *If anything?* There is no anything. The State put on *no* evidence, whether to bolster Dr. Machlus’s faulty test or to suggest that Dr. Ouaou’s results are somehow invalid. If the State is so confident that Mullens’s IQ is higher than 73, why didn’t it put on its own expert to say so? Why didn’t it administer its own IQ test? The State has no answers.<sup>18</sup>

With regard to adaptive deficits, the State argues (at 78) that certain adaptive deficits identified by Mullens, such as his failure to hold down a job or learn to drive a car, are attributable to his imprisonment at a young age, not intellectual disability. But the State ignores the many other adaptive deficits found by the postconviction court, including that, from an early age, Mullens “had problems with speech and communication and ... was highly sensitive,” that he “did not pick up on social cues and had difficulty initiating or participat[ing] in group activities,” and that he “had

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<sup>18</sup> It’s not as if the State was unable to evaluate Mullens’s intelligence for itself. The State listed a psychiatrist, Gregory Prichard, Ph.D., and a psychologist, Dr. Emily Lazarou, as potential witnesses, and had them draft expert reports. PCR/1210. Dr. Prichard was hired by the State to “reassess Mr. Mullens regarding intellectual disability.” PCR/1045. Dr. Lazarou was hired by the State “to rebut the testimony of whether or not the waiver of the jury and the plea was, in fact, voluntary and knowingly.” *Ibid.* Both Dr. Prichard and Dr. Lazarou were qualified to administer IQ testing to Mullens. PCR/1315. But they apparently chose not to. *See, e.g.*, PCR/2180–85; PCR/2354–59; PCR/2371–72 (describing Dr. Prichard’s and Dr. Lazarou’s evaluations of Mullens). In the end, the State called neither of them to testify at the postconviction hearing, leaving Dr. Maher’s and Dr. Ouaou’s testimony entirely un rebutted.

problems following direction, problems with time management, and ... reading and writing issues.” Op. 11 (PCR/2931). None of those deficits are attributable to Mullens’s time in prison, nor does the State dispute that Mullens suffers from them.<sup>19</sup> Likewise, the State does not dispute that Mullens’s symptoms arose before the age of 18.

The State also argues that—despite the postconviction court’s finding that “[t]here was simply no presentation as to Mr. Mullens’ adaptive deficits during the penalty phase, let alone whether they occurred prior to the age of 18,” Op. 12 (PCR/2932)—the postconviction court did hear comparable evidence that Mullens “is immature, impulsive, and easily manipulated, and that he has a low IQ and poor academic achievement scores.” State Br. 75. But the State is comparing apples and oranges. Adaptive deficits, like those identified at the postconviction hearing, are qualitatively different from other mental mitigating factors because they describe specific skills that Mullens lacks and tasks that Mullens cannot accomplish without assistance. *See* Op. 11 (PCR/2931). Moreover, the ABDS test for adaptive deficits

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<sup>19</sup> The State also asserts (at 74–75) that Mullens could not have introduced evidence of adaptive deficits because the court would not have admitted it. That conclusory statement has no basis. For one, it would have been deficient performance for counsel to fail to notice an intellectual disability claim. *Contra* State Br. 75. And even if the evidence would not have been admitted as proof of “adaptive deficits” *per se*, the same evidence could have been admitted as relevant mitigation evidence, which the State seems to admit. *See ibid.*

administered by Dr. Ouaou is standardized to avoid subjective labels, like “immature,” and draws from numerous sources to minimize confounding factors, such as Mullens’s attempts “to present himself as being normal,” not “sick or disabled.” PCR/1586. Based on these tests, Mullens was shown to be not merely “immature, impulsive, and easily manipulated.” *See* State Br. 75. He scored in the *first percentile* and demonstrated impairment in *all three* adaptive domains—conceptual, social, and practical. PCR/2344–45.

The State’s remaining arguments all largely make the same point: that even if Mullens does suffer from organic brain damage, the evidence available to trial counsel wasn’t sufficiently well documented to trigger a duty to investigate. All of these arguments fail. For example, the State asserts (at 81) that “there is no documentation of a history of head injuries other than reports to counsel and the mitigation specialist by Mullens and his family members.” *See also* State Br. 63 (“[T]here are no medical records that support that Mullens suffered brain damage as a child.”); *id.* at 82 (“To the extent counsel could have presented the testimony of family members regarding the alleged abuse of Mullens by his brother the decision not to is not objectively unreasonable considering the lack of independent documentation of any resulting brain injury.”). That shouldn’t come as a surprise, of course. Mullens’s childhood was marked by extreme poverty, abuse, and neglect—not fastidious recordkeeping. Putting that aside, the State’s insistence on

“independent documentation” finds no support in the caselaw. Mullens’s self-reports and statements from his family were more than enough to alert counsel to the possibility of brain damage. *See Hurst*, 18 So. 3d at 1010 (“[A] reasonable investigation into mental mitigation is part of defense counsel’s obligation where there is *any indication* that the defendant may have mental deficits.” (emphasis added)). Add to that counsel’s own observations and impressions that Mullens had possible brain damage, as well as Dr. Gamache’s and Cunningham’s recommendations that Mullens be examined for brain damage, and there can be no question that counsel’s failure to investigate amounts to deficient performance.

The State argues (at 61) that “[t]here is no evidence that Dr. Gamache recommended brain scans.” True. Menadier’s sparse notes of one conversation with Dr. Gamache (that she doesn’t even remember) do not specifically note that Dr. Gamache recommended brain scans. But Dr. Gamache did tell counsel that he suspected Mullens suffered from frontal lobe dysfunction or disorder—a fact that Menadier emphasized with an asterisk in her notes. PCR/1464; PCR/3050. That alone was enough to put counsel on notice to investigate further. Indeed, Menadier admitted that her next step should have been to order a “neuropsych workup.” PCR/1465. But she didn’t, and Dr. Gamache never even produced a written report. *Ibid.* The State also asserts (at 61) that “Dr. Gamache was more concerned about the existence of personality disorder causing Mullens’s outrageous behavior.” But that

doesn't mean he had ruled out frontal lobe dysfunction. In fact, the evidence shows the opposite. *See* PCR/1464; PCR/3050.

The State also faults the postconviction court for relying on Cunningham's "fact sheet," a report she prepared that "condensed the most serious and pertinent information about Mr. Mullens and his case." State Br. 62 (quoting Op. 20 (PCR/2940)). As the State acknowledges, Cunningham's fact sheet "noted *multiple head injuries* plus *neurological issues*, and *severe trauma* and *active psychosis*" and "specified a *low IQ score* in elementary school and a history of having an extremely *poor short-term memory* and *possible brain damage*." *Ibid.* (emphasis added) (quoting Op. 20 (PCR/2940)); *see also* PCR/3034–35 (fact sheet). The State insinuates (at 62) that these "'facts'" are unreliable because they "came from reports from Mullens and his family." But, again, the point is not that Cunningham's fact sheet constituted substantial evidence in itself, but that it was sufficient to put counsel on notice to investigate further. That failure to investigate constituted deficient performance.

**c. Trial counsel failed to adequately develop evidence that Mullens was repeatedly sexually abused and raped as a child and as an adult in prison.**

Trial counsel knew that Mullens had been repeatedly sexually abused and raped, both as a child at the hands of his stepfather and as an adult in prison. Yet they failed to substantiate these facts with available evidence at the sentencing phase.

As such, the trial court “found no competent, substantial evidence supported” this mitigating factor and gave it no weight. Op. 10 (PCR/2930); R11/1604. This too was deficient performance.

i. Mullens’s childhood sexual abuse was discovered and disclosed to trial counsel as early as 2011 and was documented in Cunningham’s numerous mitigation reports. *See, e.g.*, PCR/2992–93; PCR/3034–35. Cunningham informed counsel that, in addition to the incidents he had disclosed to her, Mullens had also “alluded to other incidents of sexual abuse as well as something that might resemble a prison rape.” PCR/2992. There was ample credible evidence available to trial counsel that Mullens had been sexually abused more than a dozen times by his stepfather. PCR/2991–92. Nonetheless, “the only evidence presented on this issue was speculation by family members and the testimony of Dr. Machlus who testified that Mr. Mullens reported that he was sexually abused by his stepfather as a child and on eight occasions while incarcerated.” Op. 10 (PCR/2930). Yet Dr. Machlus also testified that Mullens might be malingering. *Ibid.* The trial court thus “found no competent, substantial evidence supported the non-statutory mitigating circumstance that Mr. Mullens was sexually abused as a child and as an adult in prison.” *Ibid.*; *see* R11/1604 (“[T]he Court finds that this non-statutory mitigator has not been proven and therefore accords it no weight.”).

On postconviction review, the court heard credible and compelling evidence corroborating Mullens's reports that he was repeatedly sexually abused. Op. 9 (PCR/2929). Dr. Maher "testified that Mr. Mullens detailed the sexual abuse incidents and did not find Mr. Mullens to be malingering." Op. 10 (PCR/2930). "Likewise, Dr. Ouaou performed a multitude of tests with Mr. Mullens and found him not to be malingering." *Ibid.* Dr. Maher explained that when Mullens compulsively masturbated (or mimicked masturbating) while describing his sexual abuse, those involuntary movements were a "primitive, programmed, repetitive motor activity which is seen in a lot of severe brain conditions where people get stuck on something ... when they're particularly stressed from that memory, experience, or trauma." PCR/2144–45. Dr. Maher testified that this impulsive, involuntary behavior "rings very true in terms of authenticating this as a real and genuine memory experience that Khadafy [Mullens] had." PCR/2145. In other words, Dr. Maher's testimony corroborated Mullens's own reports that he had been repeatedly sexually abused and rebutted any suggestion that Mullens might be malingering. On postconviction review, Judge Federico concluded that, had this evidence been presented at sentencing, he "would have found this mitigation factor to have existed." Op. 10 (PCR/2930).

**ii.** The U.S. Supreme Court has repeatedly held that counsel's failure to present evidence of sexual abuse is deficient performance. In *Williams*, the Court

found counsel prejudicially ineffective where counsel failed to present a “graphic description of Williams’ childhood, filled with abuse and privation.” 529 U.S. at 398. And in *Wiggins*, the Court found trial counsel prejudicially ineffective for failing to present evidence that Wiggins “suffered physical torment, sexual molestation, and repeated rape during his ... years in foster care.” 539 U.S. at 535. The ABA Guidelines likewise provide that “[c]ounsel needs to explore” a defendant’s “[f]amily and social history,” including any evidence of “physical, sexual, or emotional abuse.” ABA Guideline 10.7 cmt., *in* 31 Hofstra L. Rev. at 1022.

Here, counsel knew that Mullens had been repeatedly raped as a child and as an adult, and they knew that this fact was an important mitigating factor. *See* PCR/1695. Yet they failed to uncover and present competent, substantial evidence to support such a finding. Op. 10 (PCR/2930). Rather, counsel put on testimony from someone who—despite all evidence to the contrary—thought Mullens might not be telling the truth and who failed to connect his compulsive sexual behavior to his trauma. *Ibid.* This was not a strategic decision or based on a determination that Mullens was malingering. To the contrary, counsel believed Mullens was telling the truth about his sexual abuse and knew that this evidence was crucial to the mitigation presentation. *See* PCR/1658; PCR/1695.

Based on the new evidence presented at the postconviction hearing, the trial court determined that Mullens had been “sexually abused as a child and as an adult in prison.” Op. 10 (PCR/2930). Unlike the uncorroborated and speculative testimony presented at Mullens’s sentencing, the new evidence provided a competent and substantial basis for the postconviction court to determine that Mullens had, in fact, been sexually abused. It explained Mullens’s compulsive behavior; it explained why he had told so few people about his abuse; and it dispelled any suggestion that Mullens could be malingering. *Ibid.* It is exactly this sort of detailed “graphic description” that the U.S. Supreme Court and the ABA Guidelines require. *Williams*, 529 U.S. at 398; ABA Guidelines 10.7 cmt. & 10.11 cmt., *in* 31 Hofstra L. Rev. at 1021, 1061. The postconviction court was therefore correct in finding that counsel’s failure to develop and present that evidence at sentencing was deficient performance. Op. 10, 22–23 (PCR/2930; PCR/2942–43).

iii. The State asserts (at 67) that “[t]here is no *evidence* to support the allegation of sexual abuse, let alone competent and substantial evidence.” But the State then recites the evidence that the postconviction court relied upon, namely that Dr. Maher found that Mullens had been sexually abused “because of Mullens’s hesitation and humiliation while speaking about [his abuse] and ‘in light of Mr. Mullens’ primitive, programmed, repetitive motor activity of masturbation while describing the sexual abuse to Dr. Ouaou.’” *Ibid.* (quoting Op. 17 (PCR/2937)).

Beyond that, Mullens’s aunt testified that she believed he had been sexually abused by McClendon. Op. 10 (PCR/2930); *see* R8/1215–24; R8/1285–89. As trial counsel explained, “at least one family member ... always suspected that his stepfather ... had been molesting him, but obviously nobody saw that because people molest in private, not in public.” PCR/1548.<sup>20</sup> The new evidence adduced on postconviction review corroborated and substantiated Mullens’s family’s suspicions.

The State cites instances where examiners believed Mullens was malingering. *See* State Br. 68. But none of those citations—not one—refers to an instance where anyone thought Mullens was lying about his childhood sexual abuse.<sup>21</sup> To the contrary, the record is replete with observations by Mullens’s defense team and other medical professionals documenting that Mullens had been raped as a child and as an adult. *See, e.g.*, PCR/998; PCR/2992. And the only experts to expressly consider the

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<sup>20</sup> Mullens’s mother told Cunningham that Mullens might have been sexually abused by an unnamed babysitter, PCR/2992, and she testified that when Mullens returned from prison he seemed traumatized by sexual assaults he suffered there, R8/1122; R8/1139.

<sup>21</sup> Even those examiners who considered Mullens to be malingering thought that he was exaggerating his diagnosed (and undisputed) psychoses, not his sexual abuse. *See, e.g.*, PCR/933 (“I believe that Khadafy [Mullens] is partial[ly] malingering his psychosis in that he has some true psychotic symptoms, and because of that he stretches the limits to where those symptoms typically reach.”). And the postconviction court heard evidence that “[i]f a person wants to avoid acknowledging that they were sexually abused and sexually traumatized and humiliated, they may give false answers that give the appearance of malingering.” PCR/2187.

veracity of Mullens's childhood sexual abuse expressly concluded that Mullens was telling the truth, as corroborated by his hesitancy and humiliation in speaking about the abuse and his compulsive sexual behavior when describing it. *See* PCR/2937.

The State asserts (at 68–69) that this is merely a difference of expert opinion. It is not. This is not a case where experts have come to opposite conclusions based on the same evidence. At sentencing, Dr. Machlus simply did not consider whether Mullens's hesitancy and humiliation while discussing his childhood abuse or his compulsive sexual behavior corroborated Mullens's self-reports of abuse. Dr. Machlus certainly did not rule out such a conclusion, or come to an inconsistent interpretation of the evidence. And the State notably does not contend otherwise. Instead, the State notes (at 69) that Dr. Machlus opined that Mullens's compulsive sexual behavior supported his diagnosis of bipolar I disorder. But Dr. Machlus did not consider whether that behavior was also evidence of childhood sexual abuse, nor did he rule out such a conclusion. It was not until postconviction proceedings that Dr. Maher first considered the evidence and rendered an opinion on its significance with regard to Mullens's sexual abuse.

**d. Trial counsel failed to investigate and present evidence that Mullens suffers from PTSD.**

Counsel knew Mullens had all of the tell-tale signs of PTSD yet failed to investigate further or present any evidence of PTSD at sentencing. The State does not dispute that this failure amounted to deficient performance.

i. Cunningham discovered and disclosed several bases for a diagnosis of PTSD, including Mullens’s experiences of childhood physical and sexual abuse, neighborhood violence, and prison rape. PCR/2992–97. Cunningham found Mullens had *all* of the classic symptoms of PTSD, including flashbacks, nightmares, hypervigilance, and an abnormally high startle response. PCR/1369–70; PCR/1477; PCR/2995–97. As reported in Cunningham’s notes: “After his stint at Florida State Prison, Khadafy [Mullens] came home a ‘different person.’” PCR/3035. His PTSD symptoms were confirmed by his family, who told Cunningham that “Khadafy would scream and cry whenever they tried to wake him up from sleep, as if someone were brutalizing him.” PCR/3035; *see* PCR/1369–71; PCR/2997. Based on this evidence, Cunningham diagnosed Mullens with PTSD, PCR/359; PCR/590; PCR/1394, and Cunningham and Menadier recommended follow-up tests for PTSD to Dr. Machlus and the trial team, PCR/1493; PCR/3025; PCR/3060–61. But Dr. Machlus was dismissive of the issue. PCR/1696. PTSD was not mentioned even once in Dr. Machlus’s final report.

PTSD inexplicably seemed to have fallen off trial counsel’s radar entirely. Counsel failed to include any testimony about or evidence of PTSD in the mitigation hearing or in the sentencing memoranda—for no reason. On postconviction review, lead trial counsel admitted there was no strategy in failing to investigate and present evidence of Mullens’s PTSD at sentencing, PCR/1496, and that it was a “mistake[.]”

not to. PCR/1501; PCR/1504–05. In fact, counsel “all felt like Khadafy [Mullens] had PTSD,” PCR/1695, and they were well aware that PTSD can be effectively used in mitigation, *ibid.*; PCR/1723; PCR/1779–80. Nobody could explain why they didn’t present any evidence of PTSD.

The postconviction court heard competent and substantial evidence that Mullens in fact suffers from PTSD. “Dr. Maher testified that he opines Mr. Mullens to have PTSD based on Mr. Mullens’ background of specific trauma and sexual abuse at the hand of his stepfather and on the broader conditions of neglect and disregard.” Op. 17 (PCR/2937). Dr. Maher testified that Mullens is “confused, humiliated, [and] ashamed” of having been raped, and that PTSD is “pretty standard fare with people who have sexual trauma in childhood, and it’s horrible and tragic and relevant to their lives.” PCR/2140. Dr. Maher testified that PTSD produces symptoms that he identified in Mullens, including “impulsivity, anxiety, lack of ability to plan ahead, lack of appreciation for other people’s well-being, ... a feeling of self-centeredness[,] ... school failure, [and] unjustified or exaggerated emotional rage.” Op. 17 (PCR/2937). Dr. Maher explained that PTSD is “extremely important” to Mullens’s psychological diagnosis. PCR/2146. Based on this evidence, the postconviction court found that “Dr. Maher’s testimony regarding Mr. Mullens’ PTSD appears *credible and significant* in considering the appropriate sentence for Mr. Mullens.” Op. 17 (PCR/2937) (emphasis added). Judge Federico thus concluded

that, if he had “received evidence regarding Mr. Mullens’ diagnos[i]s of PTSD ... and the implications of such diagnos[i]s, ... [he] would have found that the balance of the aggravating and mitigating factors did not warrant death.” Op. 23 (PCR/2943).

ii. Counsel believed that Mullens suffered from PTSD yet failed to investigate further or present any evidence of Mullens’s PTSD at sentencing. That failure amounted to deficient performance.

Both this Court and the U.S. Supreme Court have recognized that counsel has a duty to investigate and present evidence of mental-health issues generally and PTSD in particular. In *Ellerbee*, this Court found deficient performance where counsel had failed to present “statutory and nonstatutory mitigating evidence of: PTSD, physical and emotional abuse by his alcoholic, drug-addicted father, and expert testimony about the physical, emotional, and psychological effects of child abuse and witnessing spousal violence.” 232 So. 3d at 926. Likewise, in *Porter*, the U.S. Supreme Court found deficient performance where counsel had “failed to uncover and present any evidence of Porter’s mental health or mental impairment, his family background, or his military service.” 558 U.S. at 40. The Court specifically noted expert testimony that Porter’s “symptoms would ‘easily’ warrant a diagnosis of posttraumatic stress disorder (PTSD).” *Id.* at 35 n.4. These cases are consistent with the ABA Guidelines, which specifically note that evidence of “post-traumatic stress disorder ... could be of critical importance,” and that such evidence

may require expert analysis to be uncovered and developed. *See* ABA Guideline 4.1 cmt., *in* 31 Hofstra L. Rev. at 956–57.

As in *Ellerbee*, “[a]lthough some witnesses described” Mullens’s abuse at sentencing, “trial counsel failed to properly explore how [that] abuse affected [Mullens’s] emotional and cognitive development,” or how his abuse affected his mental state at the time of the offense. 232 So. 3d at 931. That failure fell well below prevailing professional norms. *See id.* at 932; *Porter*, 558 U.S. at 40.

**iii.** The State does not contest that Mullens suffers from PTSD or that his PTSD diagnosis is supported by “competent, substantial evidence.” *Porter*, 788 So. 2d at 923. Nor does the State contest that counsel was deficient for failing to investigate and present evidence that Mullens suffers from PTSD at sentencing. Any contrary argument is therefore waived. *See Hoskins*, 75 So. 3d at 257. Instead, the State’s few references to PTSD (at 87–88) refer exclusively to *Strickland*’s prejudice prong, which is addressed below. *See infra* Argument Section I.B.

**3. Trial counsel failed to explain how Mullens’s mental-health problems effected his mental state at the time of the crime.**

Counsel not only failed to investigate and present numerous forms of mitigating evidence. *See supra* Argument Section I.A.2. They also failed explain the effect of Mullens’s mental-health problems on his decisionmaking (or lack thereof) at the time of the crime. That failure independently amounts to deficient performance.

a. The sentencing court gave great weight to aggravating facts contemporaneous with the crime, including Mullens’s attempt to flee and avoid arrest. R15/2296–2302. But, on the other side of the ledger, the court gave less weight to the influence of extreme mental or emotional disturbance and diminished capacity. R15/2305–09. The court explained that it gave these factors less weight because counsel failed to link Mullens’s mental or emotional disturbance to Mullens’s decisionmaking at the time of the crime:

Dr. Machlus was unable to directly link the Defendant’s mental or emotional disturbance to the Defendant’s willful decision to commit murder and attempted murder.

While Dr. Machlus testified the Defendant’s Bipolar symptoms could wax and wane from mild to severe, he could not pinpoint where in the spectrum the Defendant’s Bipolar symptoms were manifesting themselves at the time of the murders.

Interestingly, Dr. Machlus never inquired of the Defendant as to his mental state at the time of the murders. *This lack of specificity leaves the Court in a position to have to speculate as to the Defendant’s condition and mental state* when he murdered Uddin and Hayworth and attempted to murder Barton.

R15/2306–07 (emphasis added).

On postconviction review, the court finally saw the full picture. Not only did postconviction counsel present *all* of the mitigating evidence (including the evidence of fetal alcohol spectrum disorder, intellectual disability and organic brain damage, sexual abuse, and PTSD that trial counsel had failed to investigate or present at sentencing); counsel used that evidence to explain Mullens’s mental state at the time of the crime, providing the “specificity” that the court had found absent at

sentencing. Postconviction counsel explained that on August 11, 2008, *six days* before the crime, Mullens’s stepfather—“the man who had repeatedly fondled, fingered, and forced him into homosexual various sex acts as a child”—was killed suddenly in a train accident. PCR/2799. Mullens’s mother told him that he was expected to attend the funeral of his childhood rapist on Monday, August 18, 2008. *Ibid.*<sup>22</sup> Postconviction counsel explained that on the day of the crime—*the day before* the funeral—Mullens was extremely mentally unstable due to his trauma, his intellectual disability, and his lack of impulse control, which was compounded by heavy drug and alcohol use that day. *Ibid.*; PCR/2822. It was then—when Mullens was at his most vulnerable—that Spencer Peeples convinced Mullens to help him rob the convenience store. PCR/2834.<sup>23</sup> Mullens’s sentencing judge was not presented with this important context until postconviction review. But once he knew

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<sup>22</sup> Mullens’s family members were shocked by his mother’s insistence that he attend the funeral. *See, e.g.*, PCR/3017 (“Sandy should never have tried to take Khadafy [Mullens] to Levi’s funeral ... that is ridiculous. She was just in denial. She knew Khadafy was being sexually abused by Levi. He was a total perv.” (alteration in original)).

<sup>23</sup> Trial counsel seemed to make the connection between Mullens’s mother compelling him to attend the funeral of his rapist and the timing of the crime. *See* PCR/3039 (“Interestingly, Mr. McClendon was killed in a train accident on August 11, 2008, just a few days before the homicides. Mr. McClendon’s funeral was held on August 18, 2008, the day after the homicides and Mr. Mullens was expected by his family to attend the funeral.”). But this connection was not explained to the sentencing court.

the whole story, he concluded that, “[h]ad a more cohesive presentation of Mr. Mullens’ mitigation evidence been presented,” he would not have sentenced him to death. Op. 23 (PCR/2943).

**b.** It is not enough for counsel to present a laundry list of mitigation factors; those facts must be explained in relation to the circumstances of the crime. The ABA Guidelines, which this Court recognizes embody prevailing professional norms that counsel must follow, advise that “it is critically important to construct a persuasive narrative [of mitigation], rather than to simply present a catalog of seemingly unrelated mitigating factors.” ABA Guideline 10.11 cmt., 31 Hofstra L. Rev. at 1061. Crafting a compelling mitigation narrative is a critical part of defending a death penalty case. *See generally* Mark E. Olive, *Narrative Works*, 77 UMKC L. Rev. 989, 1018 (2009). “The best antidote to the influence of prejudicial psychiatric labels is a compelling mitigating narrative based on a thorough life history investigation which uncovers humanizing conditions and events in the client’s life that demonstrate his human complexity, including the mental, emotional, or developmental impairments which he has struggled to overcome.” Kathleen Wayland & Sean D. O’Brien, *Deconstructing Antisocial Personality Disorder and Psychopathy: A Guidelines-Based Approach to Prejudicial Psychiatric Labels*, 42 Hofstra L. Rev. 519, 586 (2013). Perhaps most importantly, counsel must connect the mitigating evidence to the circumstances of the crime and the effect of the

mitigating evidence on the defendant's mental state. Otherwise, as the sentencing court found here, the mitigation presentation will lack the "specificity" necessary for the court to determine whether the evidence lessens the defendant's culpability. R15/2307.

The caselaw confirms that counsel's failure to construct a cohesive mitigation narrative constitutes deficient performance. In *Williams*, for example, the U.S. Supreme Court found counsel prejudicially ineffective for failing to present a "*graphic description* of Williams' childhood, filled with abuse and privation, or the reality that he was 'borderline mentally retarded,' [factors that] might well have influenced the jury's appraisal of his moral culpability." 529 U.S. at 398 (emphasis added). Other federal courts have likewise held counsel deficient for failing to "present[] a narrative that might have humanized [the defendant] to the jury." *Stankewitz v. Wong*, 698 F.3d 1163, 1175 (9th Cir. 2012).

Here, counsel not only failed to investigate important mitigating evidence; they failed to connect what little evidence they had uncovered to Mullens's mental state at the time of the crime. It was deficient performance for counsel to leave the court to speculate why the mitigation evidence mattered and how it affected Mullens's culpability.

**4. Trial counsel failed to adequately supervise Dr. Machlus's incompetent and unqualified performance.**

Defense counsel failed to recognize and prevent Dr. Machlus's incompetence and its disastrous effects on the mitigation phase of sentencing. Dr. Machlus failed to identify Mullens's organic brain damage, failed to administer psychological tests according to professional standards, made errors in scoring tests, performed repeated personality testing to diagnose antisocial personality disorder (ASPD), and failed to diagnose PTSD due to repeated childhood physical and sexual abuse. Counsel failed to recognize these errors, despite ample evidence and repeated pleas from members of the defense team. And the result was that counsel's mitigation presentation completely backfired. The postconviction court therefore correctly "[f]ound] ... counsel's use of Dr. Machlus as their sole expert as well as their management of Dr. Machlus to be deficient." Op. 9 (PCR/2929).

**a.** In a typical capital case, defense counsel will engage a whole team of experts in different fields—neuropsychologists, psychiatrists (medical doctors), brain scan experts, trauma experts, *etc.* But trial counsel engaged only Scot Machlus, a psychologist. Dr. Machlus was the only mental health expert on Mullens's defense team and the only expert witness the defense called during sentencing proceedings. Dr. Machlus was not trained in neuropsychology, was not a medical doctor, and could not interpret brain scans. He had no prior capital experience. PCR/1469–70.

After Clapp was fired for drinking on the job, Eide realized he had only *eight weeks* to find, hire, and prepare a psychological expert for trial. PCR/1743. Eide testified that he usually hired experts the day he was assigned a case, and he could think of no strategic reason for delay: “I can’t conceive of any situation where that [delay] would be useful, unless you were looking for an ineffective assistance of counsel.” PCR/1743–44. Most experienced capital experts are booked years in advance, but Dr. Machlus was available on short notice. PCR/1743–44. So, despite his patent inadequacy, Dr. Machlus was hired.

It is a basic rule of psychological evaluation that a practitioner must eliminate the possibility of basic organic brain dysfunction before identifying the cause of a problem as psychological. PCR/2132–33; PCR/2289–90; DSM-5 at xlii (explaining critical nature of state-of-the-art diagnosis of organic brain diseases in conjunction with psychology). The evaluator must rule out medical causes before they can make an accurate psychological diagnosis. PCR/2132–33; PCR/2263–65; PCR/2173–74; PCR/2289–90. But Dr. Machlus lacked the relevant qualifications and expertise to do so.

Cunningham shared details of serial head injuries, trauma, and abuse with Dr. Machlus and the trial team during meetings. PCR/1468–69; PCR/2991–3035. Medical literature has long recognized the link between drug use, abuse, trauma, and damage to the limbic frontal system, including the frontal lobes of the brain.

PCR/2115; PCR/2291. Cunningham repeatedly suggested that a neuropsychologist be engaged to evaluate brain damage and the necessity of brain scans. PCR/3026. But, as the postconviction court noted, “Dr. Machlus apparently ignored the assessments and suggestions of the mitigation specialist [Cunningham].” Op. 9 (PCR/2929). Dr. Machlus was also informed that Cassandra Washington drank while she was pregnant with Mullens. PCR/1686–87. Beyond that, Mullens’s low test scores, history of huffing aerosols as a child, repeated head trauma, and disinhibition are all tell-tale causes or symptoms of possible brain damage. PCR/2265–68; R13/2166; R13/2168–71. But Dr. Machlus never referred Mullens for a neuropsychological workup, nor did he flag these issues for counsel.

Cunningham also informed Menadier and Dr. Machlus of Mullens’s years of sexual abuse at the hands of his stepfather. PCR/1468–69; PCR/2991–92. But, as the postconviction court noted, the defense team “failed to adequately convey the mitigation factor that Mr. Mullens was sexually abused” to the sentencing court, which caused the court to give that mitigating factor no weight. Op. 9 (PCR/2929).

Dr. Machlus chose to give Mullens a common test of cognition, the Woodcock-Johnson Test of Cognitive Abilities (WCJ-COG), and an IQ test called the Weschler Adult Intelligence Scale IV (WAIS-IV). R13/2164. Mullens’s scores on the WCJ-COG revealed severe cognitive deficits, with thinking ability grade equivalent of 3.6 and delayed recall grade equivalent of 1.6. R13/2169–70. Raw data

obtained from Dr. Machlus’ administration of the WAIS-IV demonstrated that Mullens’s lowest subtest scores involved tests of working memory. R13/2168. Deficits in working memory and delayed recall are well-known indicators of the presence of organic brain damage. PCR/2267–68; PCR/2271; PCR/2288–89. Dr. Machlus knew Mullens had the delayed recall ability of a first-grader, but he never followed up on Cunningham’s repeated plea that he consult with a neuropsychologist or investigate brain scans. *See, e.g.*, PCR/3036. This error was compounded when Menadier failed to disclose that she had consulted with neuropsychologist Dr. Gamache in 2011 and that he had told her that he suspected “frontal lobe dysfunction.” PCR/3050.

Dr. Machlus made two critical errors in administering and scoring Mullens’s WAIS-IV. First, as described above, Dr. Machlus administered the exam over multiple sessions and multiple days, contrary to the WAIS-IV’s instructions. *See supra* Argument Section I.A.2.b.iii. And, second, Dr. Machlus improperly scored the similarities subtest in the WAIS-IV. Op. 11 (PCR/2931); PCR/2327–29. Because of that scoring error, Dr. Machlus reported Mullens to be in the 25th percentile rather than the 9th percentile of the population. PCR/2834. Aside from artificially inflating Dr. Machlus’s assessment of Mullens’s IQ, the error may also have obscured a basic indication of frontal lobe damage that any competent psychologist would have recognized. In addition, Dr. Machlus’s failure to administer a valid IQ test prevented

counsel from investigating an intellectual disability claim, which would have provided a categorical bar to Mullens's death sentence. Both Menadier and Miller testified that they were shocked by how high Mullens's test results were, but no one thought to double-check their accuracy. PCR/1519; PCR/1667. Nor did they follow Cunningham's advice that they should "get a second opinion." Op. 20 (PCR/2940).

Aside from failing to recognize the botched IQ test, trial counsel was also ineffective for permitting Dr. Machlus to repeatedly administer personality testing to Mullens. Dr. Machlus administered the Personality Assessment Inventory to Mullens *three times*, on October 14, 2011; January 15, 2013; and January 31, 2013. R13/2171. Likewise, he administered the MMPI-2RF, another basic personality test, on December 21, 2012. R13/2170. Based on this repeated and unnecessary testing, Dr. Machlus concluded that Mullens suffers from antisocial personality disorder.

The medical community and defense bar have long recognized that testimony about antisocial personality disorder has "enormous" prejudicial consequences. Kathleen Wayland & Sean D. O'Brien, *Deconstructing Antisocial Personality Disorder and Psychopathy: A Guidelines-Based Approach to Prejudicial Psychiatric Labels*, 42 Hofstra L. Rev. 519, 521 (2013). A defendant's diagnosis of antisocial personality disorder has been described, "in its best possible light ... [as] a basket of cobras" because of its association with remorseless and sociopathic killers. *Gerlaugh v. Stewart*, 129 F.3d 1027, 1035 (9th Cir. 1997) (finding failure to

present evidence relating to possible ASPD diagnosis did *not* constitute ineffective assistance of counsel because such evidence could in fact be “more damaging” than mitigating). And this Court has recognized that antisocial personality disorder can be *aggravating*, not mitigating, evidence. *See Allred v. State*, 186 So. 3d 530, 537 (Fla. 2016); *Floyd v. State*, 18 So. 3d 432, 453–54 (Fla. 2009).

Defense counsel recognized the risks of personality testing and an ASPD diagnosis. PCR/1799. And counsel recognized that personality testing served no strategic or mitigating purpose in Mullens’s case. *See ibid.* Nevertheless, counsel permitted Dr. Machlus to repeatedly administer multiple personality tests. Those tests were the subject of extensive cross-examination by the State at trial, permitting the State to cast Mullens as sociopathic and irredeemable. R10/1437–56. That never would have happened if Dr. Machlus and defense counsel had followed prevailing professional norms in capital cases and refused to perform personality testing.<sup>24</sup>

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<sup>24</sup> On postconviction review, both Dr. Maher and Dr. Ouaou testified that Mullens had been misdiagnosed with antisocial personality disorder:

Dr. Maher does not believe that Mr. Mullens has a diagnosis of antisocial personality disorder (‘ASPD’), and indeed, opined that features of Mr. Mullens’ personality argued against such a diagnosis, such as the presence of genuine relationships and concern and empathy for others. ... Dr. Maher administered the Hare Psychopathy Checklist test to Mr. Mullens, which is a checklist for ASPD. The results demonstrated that Mr. Mullens is significantly less antisocial than the average of male prison inmates. Dr. Maher further found that Mr. Mullens’ underlying biological foundational impairments

Although Dr. Machlus read Mullens’s medical and psychological records, he reported to the trial team that he found “nothing indicating neuropsych problems” and “no hy [history] of head injury” on January 11, 2013. PCR/3062. Counsel knew that to be false, based on substantial evidence that Mullens had suffered countless head injuries as a child—not to mention the fact that an *actual* neuropsychologist, Dr. Gamache, had indeed identified neuropsychological issues and potential brain damage. Yet counsel failed to correct Dr. Machlus’s false impression, failed to provide him with the relevant materials necessary for him to make a correct diagnosis, and failed to engage an expert qualified to conduct a neuropsychological evaluation.

**b.** The State argues (at 64) that “[t]here was no evidence presented at the evidentiary hearing that Dr. Machlus was not a qualified mental health expert or that it is objectively unreasonable for counsel to have relied on Dr. Machlus’s opinion.” That argument ignores two critical deficiencies. First, even if Dr. Machlus were a “qualified mental health expert” in some abstract sense, that does not mean that he was qualified to administer the tests and examinations necessary in Mullens’s case. Dr. Machlus was not a neuropsychologist; he could not interpret brain scans; and he

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preclude a diagnosis of ASPD. Dr. Ouaou agreed that a diagnosis of ASPD was wrong in this case.

Op. 19 (PCR/2939).

was not able to diagnose neuropsychological disorders—crucial mitigating evidence in Mullens’s case. Second, the State ignores that counsel wrongly believed that Dr. Machlus was a neuropsychologist and that he had performed a neuropsychological examination. Both of those beliefs were not only false but baseless, so counsel’s reliance on Dr. Machlus’s “expertise” was in no way reasonable.

The State also argues (at 65) that “the postconviction court’s conclusion that communication among the attorneys, the mitigation specialist, and the experts was poor does not rise to the level of deficient performance.” This conclusory assertion, however, is belied by the record. Just take the most egregious instances of miscommunication and failure to supervise. Early on in the case, Dr. Gamache told Menadier that Mullens could have brain damage, but Menadier seems to have forgotten about this conversation and didn’t tell anyone else on the team, much less Mullens’s one expert witness. Next, although counsel knew that Mullens’s mother drank heavily during pregnancy, nobody followed up with Dr. Machlus to have Mullens examined for fetal alcohol spectrum disorder. Next, although counsel knew that Mullens had suffered repeated head trauma as a child, nobody corrected Dr. Machlus’s false impression that Mullens had never suffered head trauma. Next, although counsel knew (or should have known) that Dr. Machlus was not a neuropsychologist and was not qualified to diagnose brain disorders or organic brain damage, counsel did not hire a qualified expert and in fact wrongly believed (without

any basis) that Dr. Machlus had administered the appropriate tests. Next, although counsel knew that Mullens had serious mental problems and a history of low IQ scores, they did not check Dr. Machlus's work when he returned a test result that was far higher than anyone thought was reasonable. Next, although counsel knew that personality testing served no strategic or mitigation-related purpose, they did not stop Dr. Machlus from repeatedly administering personality tests and misdiagnosing Mullens with a stigmatizing diagnosis of antisocial personality disorder. All of these errors amounted to a shocking level of miscommunication, dysfunction, and lack of supervision and contributed to counsel's deficient performance.

**5. Trial counsel's deficient performance cannot be ascribed to any strategic decision.**

The State does not argue that counsel's failures to investigate can be ascribed to any strategic decision. *See Hoskins*, 75 So. 3d at 257 (argument waived when not raised in initial brief). Nor could it. As trial counsel testified—no fewer than four times—the only explanation for their many missteps was that they “did a bad job.” PCR/1654; PCR/1687; PCR/1698. As to fetal alcohol spectrum disorder, counsel simply overlooked the evidence and failed to follow up. As to intellectual disability and brain damage, counsel failed to engage a qualified expert to examine Mullens. As to sexual abuse, counsel failed to present competent evidence that Mullens was repeatedly raped as a child and in prison. And as to PTSD, counsel knew Mullens

had all the symptoms fitting a diagnosis but did not present that evidence at sentencing. At every stage, “counsel ‘ignored pertinent avenues for investigation of which [they] should have been aware,’ and indeed w[ere] aware.” *Andrus*, 140 S. Ct. at 1882 (quoting *Porter*, 558 U.S. at 40). Instead, “counsel chose to abandon the[] investigation at an unreasonable juncture, making a fully informed decision with respect to sentencing strategy impossible.” *Wiggins*, 539 U.S. at 527–28; *see Williams*, 529 U.S. at 396–97; *Rompilla*, 545 U.S. at 390–93.

Where counsel chooses to concede guilt and pursue a mitigation strategy, the U.S. Supreme Court has repeatedly—and very recently—admonished that “[c]ounsel’s failure to uncover and present ... [existing] voluminous mitigating evidence ... cannot ‘be justified as a tactical decision.’” *Andrus*, 140 S. Ct. at 1883 (quoting *Wiggins*, 539 U.S. at 522). That is what happened here. Trial counsel advised Mullens to waive his right to a trial and a sentencing jury and to throw himself at the mercy of the court. But then they failed to follow obvious leads, failed to uncover voluminous and readily available evidence, and failed to explain all of the mitigating evidence in way that would have justified the court’s mercy. Those failures were not tactical choices; they were deficient performance.

**6. Trial counsel’s numerous errors cumulatively deprived Mullens of his right to effective assistance of counsel.**

Even if the Court is not persuaded that any one of the foregoing failures and mistakes amounts to deficient performance of counsel, the Court must consider the

cumulative effect of *all* of counsel's errors. *See Strickland*, 466 U.S. at 695 (“[A] court hearing an ineffectiveness claim must consider the totality of the evidence before the judge or jury.”). Counsel's cumulative errors in investigating and presenting mitigation evidence deprived Mullens of adequate representation at the sentencing proceeding and therefore collectively amount to deficient performance. *See State v. Gunsby*, 670 So. 2d 920, 924 (Fla. 1996); *Harvey v. Dugger*, 656 So. 2d 1253, 1257 (Fla. 1995).

**B. The Postconviction Court Correctly Determined That Trial Counsel's Deficient Performance Prejudiced Mullens.**

Counsel's performance was not merely deficient; it also prejudiced Mullens. Mullens's postconviction claims were reviewed by the same judge who rendered his death sentence. That judge weighed the mitigating and aggravating evidence presented at sentencing, and he *reweighed* that evidence together with all of the new mitigating evidence adduced on postconviction review. Based on his deep knowledge of Mullens's case and the record, his first-hand experience of trial counsel's performance at sentencing, and his careful weighing and reweighing of all the mitigating and aggravating evidence, Mullens's sentencing judge determined that, had he been presented with all of the mitigating evidence at sentencing, he would not have sentenced Mullens to death. Such a determination necessarily demonstrates that trial counsel's deficient performance prejudiced Mullens. And it

undermines any confidence that this Court or the public can have in Mullens's death sentence.

Even putting aside the sentencing judge's pronouncement that his prior sentence was wrong, it is also, objectively, reasonably likely that the outcome of Mullens's sentencing proceedings would have been different had counsel performed adequately. Mullens adduced on postconviction review strong evidence that he suffers intellectual disability, organic brain damage, fetal alcohol spectrum disorder, and PTSD related to childhood sexual and physical abuse and assaults in prison. And postconviction counsel explained—for the first time—how Mullens's trauma and mental health problems affected his decisionmaking (or lack thereof) on the day before his childhood rapist's funeral. That new mitigating evidence fundamentally changed the balance between mitigation and aggravation, rendering it reasonably likely that he would have been sentenced to life in prison, rather than death.

**1. Legal Standard: A defendant suffers prejudice if there is a reasonable probability that, but for counsel's deficiency, the sentencer would have imposed a sentence less than death.**

“[P]rejudice exists if there is a reasonable probability that, but for ... counsel's ineffectiveness, the [sentencer] would have made a different judgment about whether [the defendant] deserved the death penalty as opposed to a lesser sentence.” *Andrus*, 140 S. Ct. at 1885–86; *accord Porter*, 558 U.S. at 40 (“Under *Strickland*, a defendant is prejudiced by his counsel's deficient performance if ‘there is a

reasonable probability that, but for counsel’s unprofessional errors, the result of the proceeding would have been different.” (quoting *Strickland*, 466 U.S. at 694)). “A reasonable probability is a probability sufficient to undermine confidence in the outcome,” even if the deficient performance “cannot be shown by a preponderance of the evidence to have determined the outcome.” *Strickland*, 466 U.S. at 694. The need for “confidence in the outcome” of sentencing proceedings is particularly acute when the sentence is death. As the U.S. Supreme Court has consistently recognized, the “qualitative difference between death and other penalties calls for a greater degree of reliability when the death sentence is imposed.” *Lockett v. Ohio*, 438 U.S. 586, 604 (1978).

Some forms of deficient performance are particularly prejudicial. This Court “ha[s] consistently recognized that severe mental disturbance is a mitigating factor *of the most weighty order*, and the failure to present it in the penalty phase may constitute prejudicial ineffectiveness.” *Rose v. State*, 675 So. 2d 567, 573 (Fla. 1996) (emphasis added) (citations omitted); accord *Hurst*, 18 So. 3d at 1014 (“[M]ental mitigation that establishes statutory and nonstatutory mitigation can be considered to be a weighty mitigator, and failure to discover and present it, especially where the only other mitigation is insubstantial, can therefore be prejudicial.”). In particular, this Court has noted that “borderline intelligence, impaired intellectual functioning, possible organic brain damage and fetal alcohol syndrome” are “*all considered*

*strong mitigators.*” *Hurst*, 18 So. 3d at 1014 (emphasis added). Numerous other cases confirm the importance of “mental mitigation.” *See, e.g., Phillips v. State*, 608 So. 2d 778, 783 (Fla. 1992) (prejudice established by “strong mental mitigation” which was “essentially un rebutted”); *Mitchell v. State*, 595 So. 2d 938, 942 (Fla. 1992) (prejudice established by expert testimony identifying statutory and nonstatutory mitigation and evidence of brain damage, drug and alcohol abuse, and child abuse); *State v. Lara*, 581 So. 2d 1288, 1289 (Fla. 1991) (prejudice established by evidence of statutory mitigating factors and abusive childhood).

The fact that the sentencer may have heard *some* mitigation evidence does not preclude a finding of prejudice. Just as it is insufficient for counsel merely to conduct *some* investigation to satisfy the deficient-performance prong, *see supra* Argument Section I.A.1, “counsel’s effort to present *some* mitigation evidence [does not] foreclose an inquiry into whether a facially deficient mitigation investigation might have prejudiced the defendant.” *Sears v. Upton*, 561 U.S. 945, 955 (2010) (per curiam). Rather, “the *Strickland* inquiry requires [a] probing and fact-specific analysis,” “taking into account the newly uncovered [mitigation] evidence ... along with the mitigation evidence introduced during [the defendant’s] penalty phase trial, to assess whether there is a reasonable probability that [the defendant] would have received a different sentence after a constitutionally sufficient mitigation investigation.” *Sears*, 561 U.S. at 955–56 (citing cases); *accord Strickland*, 466 U.S.

at 695 (“[A] court hearing an ineffectiveness claim must consider the totality of the evidence before the judge or jury.”). If the postconviction court determines, after “reweighing” the new evidence with the old, that there is a reasonable probability that the balance between mitigation and aggravation would have been different, then the defendant suffered prejudice. *Williams*, 529 U.S. at 397–98.

In cases where a jury, rather than a judge, originally weighed the mitigating and aggravating evidence and rendered a defendant’s sentence, the prejudice inquiry on collateral review “necessarily require[s] a [reviewing] court to ‘speculate’ as to the effect of the new evidence” on the jury’s weighing of the mitigating and aggravating evidence. *Sears*, 561 U.S. at 956. The prejudice prong is satisfied if “there is a reasonable probability that *at least one juror* would have struck a different balance.” *Wiggins*, 539 U.S. at 537 (emphasis added).

But where the defendant waived his right to a sentencing-phase jury and the postconviction judge is the *same judge* who sentenced the defendant to death, there is no need for any “speculation.” The judge, who personally heard and weighed all of the mitigating and aggravating evidence at sentencing, is best able to determine whether the new mitigating evidence adduced on postconviction review would have changed the judge’s sentence. If that judge concludes that he would have rendered a different sentence, there is necessarily a “reasonable probability that ... the result of the proceeding would have been different.” *Strickland*, 466 U.S. at 694. This

Court—and the public—can have no “confidence in the outcome” of a sentencing proceeding when the very judge who rendered a defendant’s death sentence later pronounces in a published opinion that, had he known all of the mitigating facts, he would not have sentenced the defendant to death. *Ibid.* That is the very definition of prejudice.

**2. Mullens’s sentencing judge would not have sentenced Mullens to death had he known all of the facts.**

This is the rare case where the Court knows for certain that, but for counsel’s deficient performance, the sentencer would not have sentenced him to death. Because Mullens waived his right to a sentencing-phase jury, the trial judge found the mitigating and aggravating facts, weighed the mitigating and aggravating evidence, and rendered his sentence. The same judge then heard all of the new evidence adduced on postconviction review and, after reweighing the evidence, found that, if he had known all of the facts, he “would have concluded that the balance of aggravating and mitigating circumstances *did not warrant death.*” Op. 9 (PCR/2929) (emphasis added).

Because of this case’s unusual posture, this Court need not “speculate” whether the outcome of proceedings would have been different. *Sears*, 561 U.S. at 956. Instead, the Court can take Judge Federico at his word. The alternative—reinstating a death penalty that the sentencing judge himself has renounced—trammels the deference this Court has always afforded sentencing judges to weigh

and reweigh mitigating and aggravating evidence. *See Porter*, 788 So. 2d at 923; *Walker*, 957 So. 2d at 584. And it profoundly undermines any “confidence in the outcome”—in a case where that outcome is most grave and the need for reliability is most acute. *See Strickland*, 466 U.S. at 694; *Lockett*, 438 U.S. at 604. Executing a man based on a death sentence that the sentencing judge has subsequently declared to be both wrong on the merits and based on unconstitutional error would profoundly undermine the public’s confidence in our justice system.

**3. The new mitigating evidence fundamentally changes the balance of mitigating and aggravating evidence.**

a. Putting aside that we know, for a fact, that Mullens’s actual sentencing judge would not have sentenced Mullens to death had trial counsel presented all available mitigating evidence, Op. 9 (PCR/2929), it is also, objectively, reasonably probable that the outcome of Mullens’s sentencing proceedings would have been different had counsel performed adequately. Counsel’s failures at sentencing were at once enormous and enormously consequential. Counsel failed to uncover evidence that Mullens suffers permanent brain damage caused by his mother’s substance abuse while pregnant and by repeated head trauma. Counsel failed to engage an expert qualified to diagnosis Mullens’s intellectual disability and incapacity. Counsel failed to present evidence corroborating Mullens’s childhood sexual abuse at the hands of his stepfather. Counsel failed to present any evidence that Mullens suffers from PTSD. And counsel failed to explain how these various

mitigating factors affected Mullens’s mental state at the time of the crime—which occurred the day before he was supposed to attend his childhood rapist’s funeral. These facts, taken together and separately, fundamentally alter the balance mitigating and aggravating evidence and thus require a new sentencing.

This conclusion follows directly from this Court’s decisions in *Parker v. State*, 3 So. 3d 974 (Fla. 2009), *Hurst*, 18 So. 3d 975, and *Bevel v. State*, 221 So. 3d 1168 (Fla. 2017). In *Parker*, counsel presented *some* evidence at sentencing:

[Parker’s mitigation] witnesses testified that Parker’s childhood was chaotic and dysfunctional. His father abandoned the family when Parker was only a few months old; his mother was frequently hospitalized for serious mental problems; he spent his childhood in a series of foster homes; he was physically and sexually abused; and he has a long history of alcohol abuse and violent behavior. The State criticized the penalty phase testimony of the investigators for not being first-hand knowledge and criticized the testimony of the mental health expert because he relied almost entirely on Parker’s self-reported history and did not corroborate this information by interviewing collateral sources.

3 So. 3d at 983–84. But the sentencing court did not find any mitigators. *Id.* at 984.

On postconviction review, Parker presented *more* evidence that “fleshed out the ‘bare bones’ presented at the penalty phase proceeding and provided a stark picture of Parker’s chaotic childhood.” *Ibid.* Parker also presented testimony from three mental health experts, who “testified that Parker suffers from some level of neuropsychological impairment in his executive functioning ability, suffers from the effects of long-standing psychological deficits, and has a long history of behavioral disorders, and that his alcohol consumption exacerbates these problems.” *Id.* at 985.

This Court found these errors prejudicial and ordered a new sentencing. *Id.* at 985–86.

Likewise, in *Hurst*, this Court focused especially on evidence of mental mitigation, holding that “[m]itigation consisting of borderline intelligence, impaired intellectual functioning, possible organic brain damage and fetal alcohol syndrome—all considered strong mitigators— ... would not have been insignificant in this case.” 18 So. 3d at 1014. And in *Bevel*, trial counsel failed to uncover evidence of brain damage, frontal lobe impairment, diminished mental capacity, childhood sexual abuse, and PTSD. 221 So. 3d at 1179–80 (Fla. 2017). In both *Hurst* and *Bevel*, as in *Parker*, this Court found prejudice and remanded for new sentencing.

Mullens’s mitigation presentation at sentencing was, like Parker’s, “bare bones.” 3 So. 3d at 984. “The defense focused on Mr. Mullens’ life in poverty, beatings from his older brother, and his father teaching him to steal at a young age thereby extinguishing the distinction between right and wrong.” Op. 10 (PCR/2930); *accord Parker*, 3 So. 3d at 983–84. Counsel put on evidence from a psychologist that Mullens suffers “bipolar I disorder, a personality disorder and polysubstance dependency,” Op. 10 (PCR/2930), but “there was no evidence of Mullens’s precise mental state during the murders because Dr. Machlus did not ask Mullens about his mental state at that time,” *Mullens v. State*, 197 So. 3d 16, 24 (Fla. 2016). As in *Hurst*, counsel failed to put on any evidence that Mullens suffers from organic brain

damage, intellectual disability, and fetal alcohol spectrum disorder. And, although counsel did refer to Mullens’s childhood sexual abuse, they failed to introduce competent evidence to substantiate that factor, so the court disregarded it. Op. 10 (PCR/2930). And counsel failed to introduce evidence of PTSD. Op. 16 (PCR/2936). These missing mitigating factors are “of the most weighty order,” *Rose*, 675 So. 2d at 573—especially in a case where the few mitigators that the court did find were afforded only “moderate,” “some,” or “little weight,” *Mullens*, 197 So. 3d at 24–25; *see Hurst*, 18 So. 3d at 1014 (“[M]ental mitigation that establishes statutory and nonstatutory mitigation can be considered to be a weighty mitigator, and failure to discover and present it, *especially where the only other mitigation is insubstantial*, can therefore be prejudicial.” (emphasis added)). As in *Parker*, *Hurst*, and *Bevel*, there is reasonable probability that Mullens would not have been sentenced to death had counsel presented all of the mitigating evidence.

Aside from this Court’s precedents, numerous U.S. Supreme Court opinions presenting similar facts as here confirm that Mullens suffered prejudice. In *Williams*, the U.S. Supreme Court found counsel prejudicially ineffective for failing to find and present at capital sentencing a “graphic description of Williams’ childhood, filled with abuse and privation, or the reality that he was ‘borderline mentally retarded,’ [factors that] might well have influenced the jury’s appraisal of his moral culpability.” 529 U.S. at 398. In *Wiggins*, the Court found trial counsel prejudicially

ineffective for failing to find and present at capital sentencing that “Wiggins experienced severe privation and abuse in the first six years of his life while in the custody of his alcoholic, absentee mother. He suffered physical torment, sexual molestation, and repeated rape during his subsequent years in foster care.” 539 U.S. at 535. The U.S. Supreme Court found that the “nature and the extent of the abuse” Wiggins suffered was “considerable,” and had the jurors known about it there was a reasonable probability that they would not have returned a death sentence. *Id.* at 535–36. Likewise, in *Rompilla v. Beard*, the U.S. Supreme Court found trial counsel prejudicially ineffective for not discovering and introducing evidence that Rompilla “suffer[ed] from organic brain damage, an extreme mental disturbance significantly impairing several of his cognitive functions” that affected his “capacity to appreciate the criminality of his conduct or to conform his conduct to the law.” 545 U.S. 374, 392 (2005). The full picture of Rompilla presented on postconviction review bore “no relation to the few naked pleas for mercy” made by trial counsel, and the Court thus concluded that “[i]t goes without saying that the undiscovered mitigating evidence, taken as a whole, might well have influenced the jury’s appraisal of [Rompilla’s] culpability.” *Id.* at 393 (second alteration in original) (internal quotation marks omitted).

Mullens’s case is strikingly similar to Rompilla’s. Trial counsel below was ineffective for failing to zealously prepare, investigate, and present a cogent theory

of mitigating evidence. Counsel failed to order a neuropsychological evaluation and brain imaging, hired an incompetent psychologist who presented an incomplete analysis of psychological dysfunction, failed to investigate and present mitigation evidence of psychological trauma, prenatal toxic exposures, rape, physical abuse, intellectual disability, and serial head injuries. The U.S. Supreme Court found nearly identical failures prejudicial in *Rompilla*. See 545 U.S. at 393. This Court should find them prejudicial here.

**b.** The State barely addresses the prejudice prong in its nearly 100-page brief, relegating the point to the final five pages. And the State does not even acknowledge the fact that the *same judge* who sentenced Mullens has now decided that his original sentence was wrong. Instead, the State argues that Mullens suffered no prejudice from his counsel's deficient performance due to the weight of the aggravating evidence. State Br. 88–89. The State relies on three aggravators found by the sentencing judge: Mullens's prior conviction for aggravated battery, that the murders were committed during the course of a robbery, and that one victim was killed in an attempt to avoid arrest. State Br. 85. But the U.S. Supreme Court has repeatedly recognized that even repeat offenders convicted of extremely heinous crimes can be prejudiced by their counsel's failure to present countervailing mitigating evidence.

The facts of *Williams* are illuminating. Williams was sentenced to death after being convicted of killing his victim with a mattock when the victim refused to lend Williams a few dollars. In addition to the senseless and violent nature of the crime, at trial the State presented considerable evidence of extraneous offenses—such as Williams having “brutally assaulted” an elderly woman and left her in a vegetative state, stolen cars, set fire to a home, stabbed a man during a robbery, set fire to the city jail while awaiting trial for capital murder, and confessed to strong urges to choke other inmates and to break a fellow prisoner’s jaw. 529 U.S. at 368, 418. Yet the U.S. Supreme Court found that counsel’s deficient performance prejudiced Williams, notwithstanding the highly aggravated crime and the “simply overwhelming” evidence of future dangerousness. *Id.* at 374.

Numerous other cases—presenting facts as bad as or worse than those here—confirm that even especially heinous crimes with multiple aggravating factors do not preclude a finding of prejudice. *See, e.g., Wiggins*, 539 U.S. 510 (granting IAC relief to petitioner where crime involved 77-year-old woman found drowned in her bathtub, missing her underwear, and sprayed with insecticide); *Rompilla*, 545 U.S. at 390 (granting IAC relief after finding “beyond any doubt that counsel’s lapse was prejudicial” although victim had been stabbed 16 times, beaten with a blunt object, gashed in the face with beer bottle shards, and set on fire); *Sears*, 561 U.S. 945 (summarily reversing a no-prejudice finding in case where defendant had kidnapped,

raped, and murdered 59-year-old victim after punching her in the face with brass knuckles and handcuffing her to the backseat of a car).<sup>25</sup>

The State emphasizes that *at sentencing* the trial court gave “great weight” to the aggravators and “moderate” or “little weight” to the mitigators. State Br. 85–87. But the balance has shifted on postconviction review, now that the court has heard *all* of the mitigating evidence. *See* Op. 23 (PCR/2943). Certain factors that the court gave *no* weight at sentencing—because they were not presented (*e.g.*, Mullens’s FASD and PTSD diagnoses) or not proven (*e.g.*, Mullens’s childhood sexual abuse)—have now been given “compelling” weight. Op. 23 (PCR/2943). And other factors that had been given “little weight” have now been further substantiated (*e.g.*, Mullens’s low IQ has been proven with proper testing and substantiated with evidence of adaptive deficits and onset before age 18). Op. 12 (PCR/2932). Indeed, the fact that the Court gave little weight to the mitigating factors presented at sentencing means that counsel’s deficient performance is *more likely* to be

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<sup>25</sup> *See also, e.g., Hooks v. Workman*, 689 F.3d 1148 (10th Cir. 2012) (granting IAC relief to petitioner who had beaten his pregnant girlfriend to death in front of their one-year-old daughter, rupturing the fetus’s liver and causing severe injuries to its head and chest in utero); *Mason v. Mitchell*, 320 F.3d 604 (6th Cir. 2003) (granting IAC relief to petitioner who had sexually assaulted a 19-year-old woman, beaten her to death with a piece of wood with nails sticking out of it, then left her half-naked in an abandoned building); *Silva v. Woodford*, 279 F.3d 825 (9th Cir. 2002) (granting IAC relief to petitioner who had kidnapped, raped, tortured, and mutilated two victims and left human remains in a trash can).

prejudicial, not less. *See Hurst*, 18 So. 3d at 1014 (“[M]ental mitigation that establishes statutory and nonstatutory mitigation can be considered to be a weighty mitigator, and failure to discover and present it, *especially where the only other mitigation is insubstantial*, can therefore be prejudicial.” (emphasis added)).

The State picks out three new mitigators for criticism: Mullens’s intellectual disability and his FASD and PTSD diagnoses. State Br. 88. But these criticisms land wide of the mark. As for Mullens’s intellectual disability, the State argues that “[t]he sentencing court *did* receive evidence of Mullens’s possible intellectual disability” because “[t]he sentencing court found that Mullens established that he had a low IQ.” *Ibid.* But on postconviction review, the court heard evidence that the IQ evidence presented at sentencing was based on Dr. Machlus’s botched testing and that Mullens’s IQ was in fact far lower. Op. 11 (PCR/2931). And low IQ is only one piece of Mullens’s intellectual disability. The sentencing court did not hear any evidence that Mullens suffered organic brain damage. And “[t]here was simply no presentation as to Mr. Mullens’ adaptive deficits during the penalty phase, let alone whether they occurred prior to the age of 18.” Op. 12 (PCR/2932). This new evidence of intellectual disability goes far beyond a simple finding of low IQ.

As for Mullens’s FASD and PTSD diagnoses, the State asserts that “[n]one of the records that the defense team collected indicate that Mullens was ever previously diagnosed with PTSD or FASD.” State Br. 88. That proves nothing. The fact that

Mullens was not *previously* diagnosed does not disprove that he in fact suffers from those disorders; it does not excuse counsel's failure to identify obvious evidence and investigate further; it does not excuse counsel's failure to put on any evidence of fetal alcohol spectrum disorder or PTSD; and it does not change the balance of mitigating and aggravating evidence.

The State's entire prejudice argument boils down to its bald assertion that "[t]here is no reasonable basis to conclude that the weighing of the mitigation and aggravation would have resulted in a sentence other than death." State Br. 89. That is simply wrong. It is wrong under this Court's decisions in *Parker*, 3 So. 3d 974, *Bevel*, 221 So. 3d 1168, and *Hurst*, 18 So. 3d 975. And it is wrong under the U.S. Supreme Court's decisions in *Williams*, 529 U.S. 362, *Wiggins*, 539 U.S. 510, and *Rompilla*, 545 U.S. 374. The State ignores the quantity and quality of the mitigating evidence produced on postconviction review. It ignores this Court's admonition that "mental mitigation ... can be considered to be a weighty mitigator, and failure to discover and present it, especially where the only other mitigation is insubstantial, can therefore be prejudicial." *Hurst*, 18 So. 3d at 1014. And it ignores that the same judge who sentenced Mullens to death renounced his prior sentence on the strength of the mitigating evidence produced on postconviction review. Reweighing all of the mitigating and aggravating evidence, there is *at least* a reasonable probability that

the outcome of Mullens’s sentencing would have been different. That is all that is required for a finding of prejudice.

## **II. THE POSTCONVICTION COURT SHOULD HAVE GRANTED MULLENS’S CLAIM OF INTELLECTUAL DISABILITY**

The postconviction court erred by summarily denying Mullens’s intellectual disability claim. If a movant proves he is intellectually disabled at an evidentiary hearing on a Rule 3.851 motion the only remedy is to find him intellectually disabled, vacate the death sentence, and resentence the defendant. *Rodriguez v. State*, 219 So. 3d 751, 752 (Fla. 2017) (reviewing “an order denying a motion to vacate a sentence of death under [Rule] 3.851”). Yet, here, the postconviction court declined to hold that Mullens is intellectually disabled, even though it concluded that “Mr. Mullens presented a persuasive case of intellectual disability.” Op. 25 (PCR/2945). Instead it “denied” Mullens’s motion. *Ibid*.

The court erred. As numerous cases from this Court establish, Rule 3.851 requires the postconviction court to decide the legal and factual issues raised in Rule 3.851 motions. *See* Fla. R. Crim. P. 3.851(f)(5)(F). That rule is reflected in this Court’s repeated holdings that the postconviction court may not deny a Rule 3.851 motion if the movant shows a “facially sufficient” entitlement to relief. *See, e.g., Kocaker v. State*, Nos. SC17-1975, SC18-878, 2020 WL 370363, at \*3 (Fla. Jan. 23, 2020) (postconviction court may not deny a Rule 3.851 motion raising a “facially sufficient claim” for relief); *Matthews v. State*, 288 So. 3d 1050 (Fla. 2019) (same);

*Gonzalez v. State*, 253 So. 3d 526 (Fla. 2018) (same); *Overton v. State*, 976 So. 2d 536 (Fla. 2007) (same). The postconviction court erred by essentially summarily denying Mullens’s motion irrespective of the fact that he proved he is intellectually disabled.

The court also erred because its order denying Mullens’s motion is unsupported by “competent substantial evidence.” *Spann v. State*, 985 So. 2d 1059, 1065 (Fla. 2008). The evidence overwhelmingly established that Mullens is intellectually disabled, as the postconviction court acknowledged. The postconviction court stated that Mullens had made a “persuasive case of intellectual disability” and that “the State did not put on a case to rebut Mr. Mullens’s experts except as to the brain scans.” Op. 25 (PCR/2945). Given the postconviction court’s own factual findings, this Court should order it to vacate Mullens’s death sentence in light of his intellectual disability. At minimum, the Court should reverse and order the postconviction court to appropriately weigh the evidence and make a finding.

Finally, there are no procedural barriers to holding that Mullens is ineligible for the death penalty in light of his intellectual disability. This case raises no issues of retroactivity or forfeiture. Mullens is entitled to relief under *Hall v. Florida*, 572 U.S. 701 (2014), because it was decided while Mullens’s case was still open on direct review, meaning it should have furnished the rule of decision for an intellectual disability claim in his case. Moreover, no court has ever held that Mullens is not

intellectually disabled. Rather, because of a combination of factors—Mullens’s intellectual disability, that fact that he received ineffective assistance of counsel at his sentencing, and the fact that controlling law at the time of his sentencing hearing precluded an intellectual disability claim—Mullens’s Rule 3.851 motion was his first opportunity to raise an intellectual disability claim. Thus, this Court’s recent decision in *Phillips v. State*, No. SC18-1149, 2020 WL 2563476 (Fla. May 21, 2020), has no application in this case.

**A. Legal Standard: Intellectually Disabled People Cannot Be Executed Under Florida Law.**

Florida law protects intellectually disabled people from execution if they are found to have significantly sub-average general intellectual functioning (IQ), existing concurrently with deficits in adaptive behavior, manifested in the period between conception and age 18. *See* Fla. Stat. § 921.137(1). “[S]ignificantly sub-average general intellectual functioning” is defined as “two or more standard deviations from the mean score on a standardized intelligence test.” *Ibid.* Florida law defines “adaptive behavior” as “the effectiveness or degree with which an individual meets the standards of personal independence and social responsibility expected of his or her age, cultural group, and community.” *Ibid.*; *see also Atkins v. Virginia*, 536 U.S. 304 (2002). A person need only show a manifestation of intellectual disability during childhood, not a childhood diagnosis, to qualify as intellectually disabled under Florida law. *Oats v. State*, 181 So. 3d 457, 468–69 (Fla. 2016). The

three prongs of intellectual disability—IQ, adaptive functioning deficits, and onset before age 18—are interdependent. *Id.* at 467–68. If evidence of one prong is less strong, “a finding of intellectual disability may still be warranted based on the strength of other prongs.” *Ibid.*; see *Walls v. State*, 213 So. 3d 340, 346 (Fla. 2016). A defendant may have a greater risk of intellectual disability due to comorbidities, extensive mental health problems, frontal lobe damage, or brain dysfunction. See DSM-5 at 40.

Under current Florida law, the defendant bears the burden of proof on each element of the Florida statute by clear and convincing evidence. Fla. Stat. Ann. § 921.137(4); *Salazar v. State*, 188 So. 3d 799, 811–12 (Fla. 2016). But that higher evidentiary standard violates due process under the Fifth and Fourteenth Amendments, as well as the Eighth Amendment prohibition of cruel and unusual punishment, and the corresponding provisions of the Florida Constitution. See *Cooper v. Oklahoma*, 517 U.S. 348 (1996); *Atkins*, 536 U.S. 304. By requiring clear and convincing evidence for intellectual disability determinations, rather than a preponderance of the evidence, Florida law guarantees that people who are more likely to be intellectually disabled than not intellectually disabled will be executed. Accordingly, this Court should determine whether a defendant is intellectually disabled by a preponderance of the evidence.

Where a postconviction court has conducted an evidentiary hearing and made a finding in light of the facts developed there, this Court defers to the factual findings of the postconviction court so long as those findings are “supported by competent, substantial evidence, but will review the application of the law to the facts *de novo*.” *Mungin v. State*, 141 So. 3d 138, 142 (Fla. 2013). The summary denial of a Rule 3.851 claim, however, is a pure question of law that is reviewed *de novo*. *Kocaker*, 2020 WL 370363, at \*3.

**B. The Postconviction Court Erred by Failing To Hold That Mullens Is Intellectually Disabled.**

**1. The postconviction court was required to decide Mullens’s intellectual-disability claim.**

A postconviction court hearing a Rule 3.851 motion has no discretion to decline to decide a properly raised intellectual disability claim. Florida Rule of Criminal Procedure 3.851(f)(5)(F) states that “the court *shall rule on each claim considered* at the evidentiary hearing and all other claims raised in the motion, *making detailed findings of fact and conclusions of law with respect to each claim*, and attaching or referencing such portions of the records as are necessary to allow for meaningful appellate review.” (emphasis added). The requirements of the Rule are reflected in this Court’s precedents, which make clear that “[w]henever a movant makes a facially sufficient claim that requires a factual determination, the circuit court must hold an evidentiary hearing.” *Mann v. State*, 112 So. 3d 1158, 1161 (Fla.

2013). Indeed, “[i]f there is any doubt whether the movant has made a facially sufficient claim, this Court will presume that an evidentiary hearing is required.” *Asay v. State*, 224 So. 3d 695, 699 (Fla. 2017).

The drafters of Rule 3.851 could not have intended it to authorize meaningless evidentiary hearings in which postconviction courts may summarily deny claims even where the evidence shows that the movant is entitled to relief. Yet, that is exactly what happened here. The postconviction court explained in its order that it thought the State should have another shot at establishing that Mullens is not intellectually disabled. Op. 25 (PCR/2945). But that cannot possibly be grounds for denying relief under Rule 3.851. The State’s failure to carry its burden at the evidentiary hearing should have resulted in a finding of intellectual disability and the granting of the motion, not a do-over for the State. The postconviction court was required to reach and decide Mullens’s claim of intellectual disability, and its failure to do so was error.

**2. Mullens presented substantial and un rebutted evidence of intellectual disability.**

Mullens put on overwhelming un rebutted evidence of intellectual disability. The State did not put on any counter evidence. Because there is no “competent substantial evidence,” *Spann*, 985 So. 2d at 1065, supporting the postconviction court’s denial of Mullens’s claim of intellectual disability, the decision should be reversed, and the postconviction court should be directed to hold that Mullens is

intellectually disabled and ineligible for the death penalty. In the alternative, this Court should reverse the postconviction court’s denial of Mullens’s intellectual disability claim and direct the postconviction court to make “detailed findings of fact and conclusions of law with respect to” this claim, as required by Rule 3.851(f)(5)(F).

At the evidentiary hearing Mullens put on powerful evidence establishing all three of the prongs necessary to prove that he is intellectually disabled. *See* Op. 24–25 (PCR/2944–45). First, Mullens put on evidence establishing that he has an IQ consistent with a diagnosis of intellectual disability. Op. 10–11 (PCR/2930–31). The *only* valid and reliable IQ test in the record demonstrates that Mullens has an IQ of 73. Op. 11, 24 (PCR/2931; PCR/2944). And based on that properly administered test, Dr. Ouaou concluded that Mullens likely has an IQ consistent with intellectual disability. Op. 11, 24 (PCR/2931; PCR/2944). The State put on *no* evidence rebutting Dr. Ouaou’s conclusion. Most notably, the State did not put on its own expert, much less produce a properly administered IQ test on which Mullens had scored higher than 73.

Second, Mullens put on evidence establishing that he has suffered from adaptive deficits. Deficits in *one* of three domains—conceptual, social, or practical behavior—are sufficient for a finding of intellectual disability. *See Moore v. Texas*, 137 S. Ct. 1039, 1050 (2017); AAIDD-11 at 43; DSM-5 at 33. Dr. Ouaou reviewed

school and institutional records; interviewed childhood friends and family; consulted with Mullens's primary school teacher, Kathryn Adikes; and completed the Adaptive Behavior Diagnostic Scale (ABDS), a standardized test for adaptive functioning with two people intimately familiar with Khadafy's childhood behavior: his mother, Cassandra Washington, and his uncle, Kenneth Mullens. PCR/2343–44. Mullens's scores on the ABDS were in the first percentile and demonstrated impairment in *all three* domains. PCR/2345. Before his incarceration, he could not "drive a car, hold down a job, write a check, manage a bank account, or cook a full meal." Op. 10–11 (PCR/2930–31). Dr. Ouaou found that, before he was 18 years old, Mullens "had problems with speech and communication and he was highly sensitive." Op. 11 (PCR/2931). He also found that, among other adaptive deficits, "Mr. Mullens did not pick up on social cues and had difficulty initiating or participating in group activities"; "difficulty learning vocational skills" and "managing money"; "problems with reading"; and "problems following direction, problems with time management, and ... reading and writing issues." *Ibid.* On the basis of these deficits, Dr. Ouaou concluded that Mullens's adaptive deficits warranted a diagnosis of intellectual disability. Op. 12, 25 (PCR/2932; PCR/2945). The State put on no rebuttal evidence.

Third, Mullens put on evidence establishing that he had experienced the onset of these symptoms "during the development[al] period," that is, before he turned 18.

Op. 11, 25 (PCR/2931; PCR/2945). Again based on wide-ranging discussions with individuals who had known Mullens as a child, Mullens's neuropsychology expert, Dr. Ouaou, diagnosed Mullens as intellectually disabled. Op. 12, 25 (PCR/2932; PCR/2945). The State put on no evidence to rebut this diagnosis.

Rather than present evidence to rebut Mullens's experts, the State chose to stake its case against intellectual disability on poking holes in Mullens's evidence. Op. 25 (PCR/2945). That strategic decision failed to persuade the factfinder. *See supra* Argument Section I.A.2.b.iii. The postconviction court found that "Mr. Mullens presented a persuasive case of intellectual disability at the evidentiary hearing." Op. 25 (PCR/2945). And the court noted that "the State did not put on a case to rebut Mr. Mullens' experts except as to the brain scans [showing he may have brain damage]." *Ibid.* That should have been the end of the matter. Because Mullens showed that he is intellectually disabled, the postconviction court should have held that Mullens is intellectually disabled, not "denied" his motion. *Ibid.* In light of the overwhelming un rebutted evidence Mullens presented, this Court should reverse and direct the postconviction court to enter a finding that Mullens is intellectually disabled. Alternatively, the Court should, at the very least, reverse and

direct the postconviction court to make “detailed findings of fact and conclusions of law with respect to” this claim, as required by Rule 3.851(f)(5)(F).<sup>26</sup>

**3. *Phillips v. State* does not preclude Mullens’s intellectual-disability claim.**

There are no legal barriers to holding that Mullens is ineligible for the death penalty because of his intellectual disability. This is a paradigm case for a finding of intellectual disability on a postconviction motion. Moreover, this case raises no retroactivity issues, and no court has ever held that Mullens is not intellectually disabled. Thus, this Court’s decision in *Phillips v. State* has no application here because *Phillips* held only that *Hall v. Florida*, 572 U.S. 701 (2014) is not “retroactive to cases where there has already been a finding that the defendant is not intellectually disabled.” 2020 WL 2563476 at \*1.

As an initial matter, this is the paradigm case for a postconviction evidentiary hearing. Mullens could not have raised an intellectual disability claim at his May 13,

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<sup>26</sup> Mullens has easily satisfied Florida’s “clear and convincing evidence” standard for proving intellectual disability. See Fla. Stat. § 921.137(4). That standard, however, violates due process and the prohibition against cruel and unusual punishment found in the Fifth, Eighth, and Fourteenth Amendments of the United States Constitution and corresponding provisions of the Florida Constitution. See *supra* Argument Section II.A. Should the Court determine that Mullens has proven he is intellectually disabled by *more* than a preponderance of the evidence but *less* than clear and convincing evidence, the Court should hold that § 921.137(4) is unconstitutional, find Mullens to be intellectually disabled, and hold that he cannot be lawfully executed.

2013 sentencing hearing because of the ineffective assistance of his counsel in combination with then-controlling law. As the State itself explains in its opening brief (at 73–74), Mullens could not have raised an intellectual disability claim at his sentencing hearing because (1) his ineffective legal counsel procured an erroneously inflated IQ score of 82 on an incorrectly administered IQ test, and as a result (2) Mullens’s measured IQ at sentencing was too high for him to seek relief from the death penalty on the basis of his intellectual disability under the then-controlling precedent, *Cherry v. State*, 959 So. 2d 702, 712 (Fla. 2007), *abrogated by Hall v. Florida*, 572 U.S. 701 (2014). *See* State Br. 73–74.

But even though Mullens could not have raised his intellectual disability claim at his sentencing hearing because of *Cherry*, in fact, a different (and *lower*) evidentiary standard should have applied, as the U.S. Supreme Court later made clear in *Hall*. Because the U.S. Supreme Court decided *Hall* before Mullens’s case became final on direct review on January 9, 2017, the rule of *Hall* should have applied at Mullens’s sentencing, and therefore Mullens, with effective counsel, in fact had a viable intellectual disability claim in his case. *See State v. Johnson*, 122 So. 3d 856, 861 (Fla. 2013) (“When this Court or the United States Supreme Court announces a new rule of law, the decision generally applies to all cases that are pending on direct review or are not yet final.”). A postconviction evidentiary hearing is *the* necessary and appropriate route for Mullens to test the intellectual disability

claim he should have been able to raise under the law that should have applied at his sentencing hearing. Any other result would condemn Mullens, an intellectually disabled man with an IQ of 73, to death—in violation of the Eighth Amendment and *Atkins*, *Hall*, and *Moore*.

The fact that the U.S. Supreme Court decided *Hall* during the pendency of Mullens’s case, and the fact that no court has ever passed on the question of whether Mullens is intellectually disabled, distinguishes this case from this Court’s recent decision in *Phillips*, 2020 WL 2563476. That case resolved the narrow question of whether an individual who had already tried but failed to prove that he was intellectually disabled many years before the U.S. Supreme Court’s decision in *Hall* (and whose case had long since become final on direct review) should have yet another opportunity to prove intellectual disability under the rule announced in *Hall*. *See id.* at \*1. This Court held that *Hall* did not mark a substantive change in federal law warranting retroactive application to all cases on collateral review, *see id.* at \*4–9, but instead “merely created a limited procedural rule for determining intellectual disability,” *id.* at \*8. Because the *Hall* rule was neither a substantive federal rule nor a rule of fundamental significance, this Court held it did not warrant reopening every earlier decision denying a claim of intellectual disability. *See id.* at \*4–9.

None of *Phillips*’s rationales apply to this case. Mullens’s case was still open on direct review when the Supreme Court decided *Hall*, meaning that *Hall* is already

the rule of decision that applied to his case. *See Johnson*, 122 So. 3d at 861. Thus, unlike in *Phillips*, there is no retroactivity issue here. And unlike the appellant in *Phillips*, no court has ever held that Mullens is not intellectually disabled. Rather, Mullens, for a combination of reasons beyond his control—his intellectual disability, the inadequate assistance of his counsel, and the controlling law at the time of his trial—has never before had an opportunity to raise an intellectual disability claim. This case is thus nothing like *Phillips*, and *Phillips*’s limited holding that *Hall* is not “retroactive to cases where there has already been a finding that the defendant is not intellectually disabled,” 2020 WL 2563476 at \*1, is simply inapplicable.

There are no barriers to this Court holding that the postconviction court erred in failing to grant Mullens’s intellectual disability claim in light of the overwhelming un rebutted evidence presented at the evidentiary hearing.

### **III. THE POSTCONVICTION COURT SHOULD HAVE GRANTED MULLENS’S CLAIM THAT HIS PLEA AND JURY WAIVER WERE INVALID**

Defense counsel advised Mullens not only to “plead open” to capital murder—*i.e.*, to plead guilty without a negotiated sentence—but also to waive his right to have a jury decide whether to impose a death sentence. Trial counsel advised Mullens to undertake these waivers (1) in the face of multiple red flags about Mullens’s capacity to enter a voluntary plea; (2) despite having not investigated critically important mitigating evidence that could have been presented to the jury;

(3) based on representations that the trial judge would not impose a death sentence, which turned out to be grievously wrong; and (4) ignoring that waiving a sentencing jury meant forgoing any possibility of relief should the law governing sentencing juries change, as it did just two years later in *Hurst*. Advising Mullens to waive his rights in these circumstances amounted to ineffective assistance of counsel and caused severe prejudice. The postconviction court should have vacated Mullens’s conviction and sentence on this basis.

**A. Legal Standard: A Defendant’s Plea and Jury Waiver Must Be Competent, Intelligent, and Voluntary.**

A criminal defendant has a fundamental right under the Sixth, Eighth, and Fourteenth Amendments to the U.S. Constitution and the corresponding provisions of the Florida Constitution to be tried by a jury and to have a jury find facts necessary to impose a death sentence. *Ramos v. Louisiana*, 140 S. Ct. 1390, 1395 (2020); *Hurst*, 136 S. Ct. at 622. While a defendant is permitted to waive those rights, any waiver must meet two independent requirements. First, the defendant must be “competent” to enter a plea or waive his right to a jury—*i.e.*, he must have “the capacity to understand the proceedings and assist counsel.” *Godinez v. Moran*, 509 U.S. 389, 402 (1993). Second, any waiver must be “intelligent and voluntary.” *Koenig v. State*, 597 So. 2d 256, 258 (Fla. 1992). Courts “indulge every reasonable presumption against waiver” and may not “presume acquiescence.” *Johnson v. Zerbst*, 304 U.S. 458, 464 (1938).

A claim that a defendant was incompetent or did not intelligently and voluntarily waive his rights is properly raised on postconviction review when the invalid waiver is attributable to ineffective assistance of counsel—for example, when counsel failed to investigate or present facts bearing on the defendant’s competency to plead guilty, *see Thompson v. State*, 88 So. 3d 312, 316 (Fla. 4th DCA 2012), or when counsel “misinformed the defendant as to sentencing rights or options, thus establishing that the defendant did not enter a knowing and voluntary plea,” *Baker v. State*, 879 So. 2d 663, 664 (Fla. 5th DCA 2004).

In the context of a guilty plea, prejudice is established if “there is a reasonable probability that, but for counsel’s errors,” the defendant “would not have pleaded guilty.” *Roe v. Flores-Ortega*, 528 U.S. 470, 485 (2000). Courts “do not ask whether,” had a defendant gone to trial, “the result of that trial ‘would have been different’ than the result of the plea bargain”; rather, the question is “whether the defendant was prejudiced by the ‘denial of the entire judicial proceeding.’” *Lee v. United States*, 137 S. Ct. 1958, 1965 (2017). Prejudice stemming from waiver of the right to a sentencing jury is established when there is a reasonable likelihood that counsel’s ineffectiveness “would have altered his decision to forgo a penalty-phase jury.” *Lynch v. State*, 2 So. 3d 47, 71 (Fla.), *as revised on denial of reh’g* (Jan. 30, 2009).

**B. The Postconviction Court Erred in Finding Mullens's Waivers Competent, Intelligent, and Voluntary Despite Trial Counsel's Numerous Failures.**

**1. Counsel failed to investigate and present important evidence showing that Mullens was incompetent to voluntarily plead guilty and waive the sentencing jury.**

The postconviction record established that Mullens was not competent to plead guilty or to waive his right to a sentencing jury, and that trial counsel acted unreasonably by ignoring evidence that Mullens lacked capacity and by advising him to waive those fundamental rights.

At the outset, undisputed evidence established that Mullens was under severe emotional distress in the weeks immediately leading up to his plea and waiver of the sentencing jury. Mullens's sister Kendra died of a drug overdose in February 2013, in the midst of Mullens's discussions with counsel. PCR/1653. Mullens developed depression so severe that he could hardly speak without slurring. PCR/2069. He was placed on psychiatric observation and suicide watch one day prior to his signature on a defense memorandum indicating that he would plead guilty without a negotiated sentence. PCR/3277. In light of Mullens's behavior, all of the professionals on Mullens's team explained that they had serious concerns about his ability to understand consequences, meaningfully consult with counsel, and make informed decisions. PCR/1656–59; PCR/1730–31; PCR/1740; PCR/1794. And yet counsel forged ahead with advising a guilty plea and jury waiver.

On top of Mullens's severe emotional distress during plea discussions, undisputed evidence established that in the leadup to his plea, antipsychotic medication was warping Mullens's state of mind and hindering his decisionmaking. On postconviction review, Dr. Maher reviewed the medical records that trial counsel had neglected to request from the Pinellas County Jail and found that Mullens had been prescribed perphenazine—"an incredibly powerful mind-altering sedative" used to treat psychosis. PCR/2223–24. Mullens had been prescribed 16 mg daily, the maximum daily outpatient dose permitted under medical guidelines. PCR/2196. Dr. Maher testified that "[i]f I gave 16 milligrams of that drug to a patient in my office, I would not expect them to have any idea what was going on." PCR/2223. The drug at that dosage prompts the inability "to weigh ... long-term consequences"—patients describe feeling "marshmallowy," "disconnected," "amorphous," and as though "things ... are just kind of pushing along." PCR/2201.

Dr. Maher further testified that, if a patient taking perphenazine had "an abnormal brain, you would have additional side effects diminishing the individual's cognition, understanding of his environment and judgment." PCR/2199. "[W]hen there's an impairment or a malfunction in the frontal lobe and you add a sedative, it is synergistically diminishing in the frontal lobe capacity." PCR/2200.

Compounding Mullens's severe distress and adulterated mental state, postconviction testing indicated that Mullens had extremely low levels of verbal

comprehension. PCR/2202–04. Dr. Maher testified that for patients like Mullens who have “very low verbal comprehension from the start,” perphenazine “would induce a state of mind where he is inclined to be agreeable, where he is inclined to answer questions from authority figures, particularly in a formal environment, in the affirmative.” PCR/2202.

Dr. Maher concluded that—given Mullens’s PTSD, brain damage, emotional stress, and heavy dose of antipsychotic medication—Mullens was not “capable of making a knowing and voluntary plea” in April 2013. PCR/2203–04. Dr. Maher confirmed that nothing in Mullens’s plea colloquy (or his pre-plea competency hearing) affected that conclusion. “[U]nfortunately,” Dr. Maher explained, “the pattern of responding in the affirmative ... about what he understood is not a confirmation of his competency” given Mullens’s “circumstances, his state of mind, his diagnoses, [and] his medication.” PCR/2204–05. Correspondence sent after the plea hearing, consistent with Dr. Maher’s testimony, confirmed that Mullens did not in fact understand the significance of his guilty plea. PCR/3780–84 (State’s Exs. 14 & 15).

Trial counsel did not investigate these key facts, and they therefore were not presented to the trial court before it found Mullens competent to proceed. Specifically, trial counsel did not obtain medical, psychological, or disciplinary records from the Pinellas County Jail from after October 2012. Those records would

have informed counsel of Mullens’s intense depression, suicidal episode, and heavy medication—all of which a reasonable attorney would have brought to the court’s attention and would have likely changed the outcome of the court’s competency determination.

In nonetheless finding Mullens’s waivers voluntary, the postconviction court focused on testimony indicating that Mullens *was better* able to communicate with counsel when on his antipsychotic medication. Op. 6 (PCR/2926). But that fact, even if true, is irrelevant. It does not matter if Mullens would have been even *less* competent without intense sedative medication; he was still incompetent to plead guilty while on it, which trial counsel should have known. Competency is not a relative question; the question is whether Mullens was able to understand the proceedings and able to provide an intelligent, voluntary waiver. On that critical question, Dr. Maher’s key testimony was un rebutted.

The court, moreover, ignored extensive, un rebutted testimony describing how Mullens’s specific medication rendered him unable to render a voluntary waiver even though he may have appeared competent to third-party observers. Again, Dr. Maher explained that “the pattern of responding in the affirmative ... about what he understood is not a confirmation of his competency” given Mullens’s “circumstances, his state of mind, his diagnoses, [and] his medication.” PCR/2204–05. To be sure, the State attempted to poke holes in one aspect of Dr. Maher’s

testimony: it denied the possibility of interaction between Mullens's medication and his brain function because it disputed that Mullens had suffered brain damage at all. PCR/2905–06. And the State tried to cast doubt on Mullens's incompetency along the same lines as the district court, citing other scattered evidence of Mullens's intellectual engagement. But the State tellingly did not dispute Dr. Maher's core conclusion that, given Mullens's mental state and medication, he could not meaningfully understand the consequences of a guilty plea or jury waiver, and that outward manifestations of his understanding could not be trusted.

For that same reason, Mullens's plea colloquy, even if "thorough," Op. 8 (PCR/2928), does not bear on the question of ineffective assistance presented here. Dr. Maher specifically reviewed that colloquy and explained cogently why it did not change his opinion: assent from a deeply depressed and heavily medicated individual with limited verbal cognition cannot be taken at face value. Trial counsel acted unreasonably by doing so.

**2. Mullens could not have intelligently waived his right to a sentencing jury because trial counsel did not investigate key mitigating evidence.**

Independent from Mullens's manifest lack of competency to waive his constitutional rights, Mullens could not validly waive his right to a sentencing jury because counsel failed to investigate entire categories of mitigating evidence that could have had a dispositive effect on his sentence. As the postconviction court

concluded, counsel was deficient in failing to investigate and present evidence related to Mullens's PTSD, FASD, head injuries, neuropsychological testing, intellectual disability, and brain damage. *Supra* Argument Section I.A.2. And those failures were manifestly prejudicial; the postconviction court found a reasonable probability that it would not have imposed a death sentence in the face of that mitigating evidence. *Supra* Argument Sections I.B.2–I.B.3.

These findings should have led the postconviction court to conclude that Mullens's jury waiver was necessarily involuntary, and that counsel acted unreasonably by advising it. Indeed, while the court pointed to Mullens's mental state at the time of the plea (discussed above) and the effect of *Hurst* (discussed below) as purportedly undercutting this claim, the court did not attempt to explain how, in light of its findings that counsel had neglected to develop mitigating evidence that the court found reasonably likely to be dispositive, Mullens's waiver of his right to an advisory jury could have been adequately informed. The court's comment that counsel's plea and waiver strategy was "researched" and "thoughtful," Op. 9 (PCR/2929), simply did not account for the court's own conclusion that counsel had not investigated the very evidence they would have presented to the jury.

**3. Mullens could not have intelligently waived his right to a sentencing jury because counsel severely understated the risks of waiver.**

Counsel advised Mullens to “plead open” and to waive the right to a sentencing jury based at least in part on their assessment that the judge “had never given death.” PCR/3040. This, too, was unreasonable and rendered Mullens’s waiver of his right to a jury invalid. A guilty plea to a murder charge based on an attorney’s mistaken promise that the judge will not impose the death penalty will result in an automatic reversal, even if the motion is made well after the imposition of the sentence. *See Costello v. State*, 260 So. 2d 198 (Fla. 1972). Even where counsel does not make a hard promise, this Court has cautioned that “[d]efense attorneys must be careful when advising their clients to plead guilty.” *Id.* at 202. “It is unprofessional conduct for a lawyer intentionally to understate [or] overstate the risks, hazards or prospects of the case to exert undue influence on the accused’s decision as to his plea.” *Ibid.* (citations omitted); *see also* Fla. Public Defender Ass’n, *Defending a Capital Case in Florida* 10 (5th ed. 1999) (“Too much is given up by pleading or going non-jury based on a guess [about the trial judge]. Well-reasoned strategy and tactics should be utilized in a capital case, not guesswork.”). That is exactly what trial counsel did here.

**4. Mullens could not have intelligently waived his right to a sentencing jury because *Hurst* upended those consequences.**

Finally, Mullens could not knowingly waive his right to be sentenced by a jury because he made that waiver before the U.S. Supreme Court's January 2016 decision in *Hurst v. Florida*. Trial counsel would not have advised Mullens to waive a jury had they known that the Supreme Court in *Hurst* would hold that a jury must unanimously find facts supporting the imposition of a death sentence, and had they believed they could have found at least one juror that would not have voted to impose a death sentence. PCR/1434–37; PCR/1647–48. The intervening decision in *Hurst* thus rendered Mullens's plea ineffective, on two bases.

First, the colloquy conducted in this case made it clear that Mullens was waiving only a jury "recommendation." R15/2252–82. Mullens did not waive a jury determination of any aggravating circumstance, as *Hurst* expressly requires, 136 S. Ct. at 624, and he certainly did not waive a unanimous jury determination that a death sentence should be imposed, as the Eighth Amendment requires.

Second, because counsel specifically preserved a challenge to Florida's capital sentencing procedure as unconstitutional under *Ring v. Arizona*, 536 U.S. 584 (2002), waiving a sentencing jury was unreasonable because it effectively nullified counsel's own challenge and made relief for Mullens under *Hurst* unavailable on direct review. In other words, the only way to ensure Mullens had an effective route

to challenge Florida’s judge-imposed death penalty system in place before *Hurst*—a system trial counsel recognized was unconstitutional under *Ring*—was to advise that Mullens insist on a jury having a say in his sentencing. By giving up the sentencing jury, counsel gave up the prospect of relief on appeal, even after *Hurst* was decided. *See Mullens*, 197 So. 3d at 38.<sup>27</sup>

In rejecting Mullens’s argument, the postconviction court misunderstood the significance of *Hurst*. The point is not just that trial counsel were ineffective because they failed to anticipate *Hurst*. Op. 8 (PCR/2928). Rather, it is that because *Hurst* changed the significance of a sentencing jury—converting the jury from purely advisory body to the conclusive factfinder—Mullens did not understand, and indeed could not have understood, what he was giving up by forgoing a sentencing jury.

**C. If Mullens Had Been Competent and Adequately Informed of the Consequences of His Plea and Waiver, He Would Not Have Made Them.**

The State below did not dispute that—assuming counsel did act unreasonably—there is a reasonable probability that Mullens would not have waived

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<sup>27</sup> This Court’s decision on Mullens’s direct appeal suggests that Mullens could validly waive his right to a sentencing jury prior to *Hurst*. *See* 197 So. 3d 16. But that decision did not resolve a postconviction challenge asserting that counsel was *ineffective* for advising such a waiver. Thus, this Court is free to hold that trial counsel was ineffective for advising that Mullens waive his right to a sentencing jury. And to the extent that this Court believes that its decision on direct appeal forecloses Mullens’s ineffectiveness argument based on *Hurst* here, it should reconsider its direct-appeal decision.

his rights absent the ineffective assistance. That is because there can be no such dispute. At minimum, reasonable counsel would have brought to the trial court's attention the significant evidence undercutting Mullens's competency, which would have foreclosed Mullens from entering a guilty plea or a jury waiver—or indeed from proceeding to trial—unless and until he became competent to proceed.

In light of the overwhelming unrebutted evidence that Mullens's plea and jury waiver were not competent, intelligent, and voluntary—and that counsel should have known as much—this Court should reverse the postconviction court's rejection of this claim.

#### **IV. MULLENS'S PRETRIAL AND SENTENCING PROCEEDINGS WERE TAINTED BY OVERWHELMING CUMULATIVE ERROR**

The cumulative effect of counsel's numerous errors at both the guilt and penalty phases deprived Mullens of his constitutional right to a fundamentally fair proceeding, guaranteed under the Sixth, Eighth, and Fourteenth Amendments and corresponding provisions of the Florida Constitution. *See State v. Gunsby*, 670 So. 2d 920, 924 (Fla. 1996) (“[W]hen we consider the cumulative effect of the testimony presented at the rule 3.850 hearing and the admitted *Brady* violations on the part of the State, we are compelled to find, under the unique circumstances of this case, that confidence in the outcome of Gunsby's original trial has been undermined and that a reasonable probability exists of a different outcome.”); *Cherry v. State*, 659 So. 2d 1069 (Fla. 1995) (cumulative effect of numerous errors in counsel's performance

may constitute prejudice); *Harvey v. Dugger*, 656 So. 2d 1253 (Fla. 1995) (same). In light of the cumulative effect of those errors, the Court should vacate Mullens's plea, jury waiver, and conviction, and order the postconviction court to grant Mullens new guilt and penalty phases.

### **CONCLUSION**

Mullens respectfully requests the following alternative forms of relief:

(1) If the Court agrees that Mullens's trial counsel rendered unconstitutionally ineffective assistance of counsel at sentencing, then the Court should affirm the decision below in relevant part and remand for further proceedings.

(2) If the Court agrees that Mullens is intellectually disabled, then the Court should reverse the decision below in relevant part and remand with instructions to enter an order holding that Mullens is intellectually disabled and ineligible for the death penalty.

(3) If the Court agrees that the district court erred in failing to decide Mullens's intellectual disability claim on the merits, then the Court should reverse the decision below in relevant part and remand with instructions to make "detailed findings of fact and conclusions of law with respect to" this claim, as required by Rule 3.851(f)(5)(F).

(4) If the Court agrees that the postconviction court erred by denying Mullens's claim that his plea and jury waiver were invalid, the Court should reverse

the decision below in relevant part and remand with instructions to enter an order vacating Mullens's plea, jury waiver, conviction, and sentence.

(5) If the Court agrees that cumulative error deprived Mullens of fair guilt and penalty phases, the Court should reverse the decision below in relevant part and remand with instructions to enter an order vacating Mullens's plea, jury waiver, conviction, and sentence.

August 6, 2020

Respectfully submitted,



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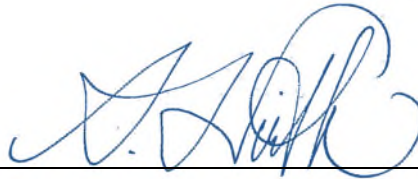
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## **CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that on August 6, 2020, this brief was electronically filed with the Clerk of the Court using the Florida Courts E-Portal Filing System, which will send a notice of electronic filing to counsel for the State:

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## **CERTIFICATE OF COMPLIANCE**

I HEREBY CERTIFY that this brief complies with the typeface requirements of Florida Rule of Appellate Procedure 9.210(a)(2), because it was prepared in 14-point Times New Roman.

A handwritten signature in blue ink, appearing to read 'S. Wirth', is written over a horizontal line.

Stephen K. Wirth